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TOGETHER WITH THE PRACTICE OF THE COURTS OF WARDS IN BENGAL, MADRAS, AND THE NORTH-WESTERN PROVINCES.

BY

ERNEST JOHN TREVELYAN,

Barrister-at-Law.

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ADDITIONS AND CORRECTIONS.

Page 8, note 7, *for* "sec. 2" *read* "sec. 52."

,, 9, note 2, *add Gordhandas* v. *Harivalubhdas*, I. L. R., 21 Bom., 281.

,, 10, note 5, *for* "to whom" *read* "in whose cases."

,, 15, note 3, *add* "See *Ganesh Lala* v. *Bapu*, I. L. R., 21 Bom., 198. It was held however in *Dhanmull* v. *Ramchunder Ghose*, I.L.R., 24 Calc., 265; 1 Calc., W. N. 270, that a minor, who has falsely represented himself to be of age must make specific restitution of what he has received, and that he cannot be sued on the contract."

Page 19, note 5, *for* "VII," *read* "VI."

,, 32, note 1, *add* "See *Subramania Ayyar* v. *Sitha Lakshmi*, I. L. R., 20 Mad., 147.

Page 32, note 6, *for* "Act X of 1881," *read* "Act V of 1881."

,, 39, note 10, *for* "6" *read* "60."

,, 48, In place of this page and the first two lines, and note 1 of page 49 insert the following: "The law relating to reformatory schools is now to be found in Act VIII of 1897 which see."

Page 49. *Add* the following: "A Court may instead of punishing an offender under fifteen years of age, order him to be—(*a*) discharged after due admonition, or (*b*) delivered to his parent or to his guardian or nearest adult relative, on such parent, guardian or relative executing a bond, with or without sureties, as the Court may require, to be responsible for the good behaviour of the youthful offender for any period not exceeding twelve months; Act VIII of 1897, sec. 31."

Page 52, note 1, *add* "See however *Queen-Empress* v. *Ram Sundar*, I. L. R., 19 All., 109."

Page 65, note 5, *for* "C" *read* "Cr."

,, 107, note 6, *for* "IX" *read* "IV."

,, 121, line 11, *for* "power" *read* "persons."

,, 121, note 4, *add* "In *In re Meakin*, I. L. R., 21 Bom., 137; a guardian of a minor residing in England, was appointed by the Bombay High Court."

Page 122, note 3, *add* "*In re Meakin*, I. L. R., 21 Bom., 137."

,, 129, note 4, *add* "Act IX of 1872, secs. 14 and 16."

,, 134, line 12, *Strike out* "and II."

,, 158, and page 179, para. 1, *add* the following: "Although a sale may be unauthorized, a guardian may be compelled to register the deed of transfer; *Rajlakhi Ghosh* v. *Debendra Chandra Mazumdar*, 1 Calc., W. N., 444."

Page 171, line 10, *for* "weer" *read* "were"

,, 295, note 4, *add* "As to the fraud of the agent of the minor see *Ram Autar* v. *Muhammad Mumtaz Ali Khan*, 1 Calc., W. N., 417."

Page 296, note 2, add *Ram Autar* v. *Muhammad Mumtaz Ali Khan*, 1 Calc., W. N., 417."

Page 305, note 5, line 1, *add* "*Girijanath Roy* v. *Patani*, I.L.R., 17 Calc., 263."

,, 308, line 1, *for* "Acknowldgment" *read* "acknowledgment."

CHAPTER I.

Age of Majority and Domicile.

A MINOR is a person who has not attained the age of majority according to the personal law to which he is subject. This age is arbitrarily fixed by the law of each country, and is chosen with reference to the time of life when persons ordinarily have attained years of discretion and are capable of the management of their own affairs. Minor.

Until the passing of the Indian Majority Act,[1] there was no uniform age of majority in British India. The age of majority of Hindus and Mahomedans was determined by the provisions of their respective laws, modified under certain circumstances by Acts of the Legislature; while the limit of the minority of European British subjects, and other inhabitants of India, was derivable from other sources of law. Age of majority before Majority Act.

The Hindu law did not originally fix any specific age of majority. Menu says:[2] "Let a Brahmin, having dwelt with a preceptor during the first quarter of a man's life, pass the second quarter of human life in his own house, when he has contracted a legal marriage." We have the following sloka from the Narada Smriti:[3] "From the moment God gives life, till eight years of age, a child may be considered as if in the womb; from his eighth year, till his sixteenth year, he may be called a boy; and then Hindu law. Menu. Narada Smriti.

[1] IX of 1875, came into force 2nd June 1875.

[2] According to the Gloss of Colluca, translated by Sir W. Jones, chap. iv, sloka I.

[3] See the Maharajah of Vizianagram's speech on the Indian Majority Bill in the Legislative Council. —*Supplement to the Gazette of India of April 25th*, 1874, p. 671. Colebrooke's Digest, Bk. I, chap. v, verse 188; Bk. II, chap. iv, verse 15.

a youth ; after that period he can begin to see for himself independent of his parents." The interpretation put upon this last sloka by the pundits was, that the sixteenth year is the limit of minority for Hindus ; but opinions varied as to whether the limit was the first or the last day of the sixteenth year.[1]

Bengal school.

The writers of the Bengal school of law accepted the first day of the sixteenth year, that is to say, the termination of the fifteenth year,[2] as the limit of minority, both for males and females.[3] This interpretation was adopted by the English courts of law in Bengal.[4]

Benares and Mithila schools. Jain law.

The Benares and Mithila schools of law placed the age of majority at the expiration of the sixteenth year,[5] which was also the limit of minority for persons subject to the Jain law,[6] and for Hindus in Southern India[7] and Bombay.[8]

Mahomedan law.

Under the Mahomedan law, according to Macnaghten,[9] all persons, whether male or female, are considered minors, until after the expiration of the sixteenth year, unless symptoms of puberty appear at an earlier period.[10]

There is no doubt that puberty is the test of majority according to Mahomedan law ;[11] but in another part of

[1] See remarks in note to *Lachmun Dass* v. *Rupchand*, 5 Sel. Rep., 115, 2nd Edn., 136.

[2] *Lachmun Dass* v. *Rupchand*, 5 Sel. Rep., 115, 2nd Edn., 136. See Annotation of Srikrishna to the Dayabhaga, chap. iii, verse 17 ; 1 Macnaghten's Hindu Law, Edn. 1829, p. 103.

[3] 2 Macnaghten's Hindu Law, Edn. 1828, p. 220.

[4] *Cally Churn Mullick* v. *Bhuggobutty Churn Mullick*, 10 B. L. R., 231; 19 W. R. C. R., 110 ; *Monsoor Ali* v. *Ramdyal*, 3 W. R. C. R., 50 ; *Deobomoyee* v. *Joggessur Hati*, 1 W. R. C. R., 75 ; *Lvckheenarain Mujumdar* v. *Muddhosodun*, Ben. S. D. A. 1853, 505 ; and *Sheebsunker Dass* v. *Ulick Chunder Aych*, Ben. S. D. A. 1859, 885.

[5] Strange's Hindu Law, vol. ii, pp. 76 and 80 ; Macnaghten's Hindu Law, vol. i, chap. vii, Edn. 1829, p. 103.

[6] *Govindnath Roy* v. *Gulal Chand*, 5 Sel. Rep., 280 ; 2nd Edn., 322.

[7] Strange's Hindu Law, vol. i, p. 72 ; vol. ii, pp. 76, 77.

[8] *Shivji Hasum* v. *Datu Mavji*, 12 Bom. H. C. R., 281, 290.

[9] Principles of Mahomedan Law, chap. viii, 4th Edn., p. 62.

[10] Followed in *Moolreram* v. *Agha Meer*, Ben. S. D. A., 1856, p. 569 ; and *Abdool Oahad Chowdhry* v. *Elias Banoo*, 8 W. R. C. R., 301.

[11] *Rumzaun Ally*, 4 Sev. 851, Baillie's Law of Sale, 2. In his speech on the Majority Bill, reported at p. 670 of the Supplement to the *Gazette of India* for April 25th, 1874, the Maharajah of Vizianagram

Macnaghten's work, the expiration of the fifteenth year is stated as the time of the attainment of majority by persons subject to the Mahomedan law.[1]

The Koran.

In the Koran it is said:[2] "Examine the orphans until they attain the age of marriage (or age of maturity): but (*i.e.*, and then) if you perceive they are able to manage their affairs well, deliver their substance unto them; and waste it not extravagantly, or hastily, because they grow up (*i.e.*, because they will shortly be of age) to receive what belongs to them."

In addition to the *bulugh*, or age of puberty, they must have attained the *rashad*, or true path,—*i.e.*, the knowledge to judge good from bad, to understand religious matters, and to manage their property efficiently, before the property can be delivered over to them.[3]

Durr-ul Mukhtar.

The Durr-ul Mukhtar expressly lays down,[4] that the completion of the fifteenth year is the limit of minority, unless signs of puberty occur at an earlier age; and this authority is supported by the Jami-ur-Ramuz.

Haneefa.

Haneefa fixed the age of majority for males at the completion of eighteen years, and for females at the completion of seventeen years, if they do not show signs of puberty at an earlier age. Haneefa's two disciples (Abu Yusuf and Muhammed) fixed the age of majority at the end of the fifteenth year for both males and females, and there is one report of Haneefa to the same effect.[5] The opinions of Abu Yusuf and Muhammed on this subject may be taken as equal to, if not surpassing that of, their master.[6]

Abu Yusuf and Muhammed.

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quotes the opinion of Munshi Amir Ali, whom he describes as an acknowledged and highly respectable Mahomedan authority, that the age regarding majority prescribed in the Mahomedan law has direct reference to young persons acquiring right for practising offices connected with religion.

[1] Macnaghten's Mahomedan Law. Precedents, chap. iv, case 17.

[2] Chap. IV, Sale's Translation.

[3] Durr-ul Mukhtar. See Supplement to *Gazette of India*, April 25th, 1874, p. 670.

[4] Pp. 685 and 686. See Tagore Law Lectures for 1873, by Shama Churn Sircar, p. 473.

See Hedaya, vol. iii, Bk. XXXV, chap. ii, Hamilton's Translation, Edn. 1791, pp. 482 and 483.

[6] See Morley's Digest, Introduction, pp. cclxii and cclxiii.

Hedaya.

The author of the Hedaya[1] may be also taken as supporting the opinion of the two disciples in preference to that of their master.[2]

There, therefore, seems to be uncertainty as to the limit of minority under the Mahomedan law for males as well as for females;[3] but all writers concurred in fixing puberty as the test of majority, with this proviso that the earliest age of majority was twelve years in respect of a boy and nine years in respect of a girl, there being an irresistible presumption that before those ages there could be no puberty.

Result of authorities.

The result of the authorities seems to be that, at the expiration of the fifteenth year, an irresistible presumption of puberty arises.

Puberty of female.

In the absence of evidence to the contrary, a Mahomedan girl who has attained the age of nine years is to be taken as having attained the age of puberty.[4]

Statement of minor as to age.

The Mahomedan law required that the declaration of a boy or girl, who had passed the minimum age, should be taken as conclusive,[5] but the question will now, when it arises in a proceeding in a court of law, be determined only by the rules contained in the Indian Evidence Act.[6]

Thus the Mahomedan law, and the Hindu law current in Bengal, pointed to the end of the fifteenth year as the time when persons are to be considered competent to manage their own affairs.[7]

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[1] Burhan-uddin Ali.

[2] See Tagore Law Lectures for 1873, note to p. 474.

[3] See *Enaet Hussain* v. *Roshun Jahan*, 5 W. R. C. R., 4; *Mulka Jehan* v. *Mahomed Ushkuree Khan*, L. R., I. A., Sup. Vol., 192; 26 W. R. C. R., 26. *Muttoo* v. *Nasiralee Khan*, 2 Sel. Rep., S. D. A. N. W. P., 473.

[4] *Mulka Jehan* v. *Mahomed Ashkuree Khan*, L. R., I. A., Sup. Vol., 192; 26 W. R. C. R., 26.

[5] Hedaya, vol. iii, Bk. XXXV, chap. ii; Macnaghten's Mahomedan Law. Precedents, chap. vi, cases 17 and 18; *Shamsoonnissa* v. *Ashrafoonnissa*, 2 Sev. 299.

[6] I of 1872. As to the proof of minority, when in issue, see *post*, chap. xxix.

[7] See the preamble to Bengal Regulation XXVI of 1793.

European British subjects.

Before the passing of Act IX of 1875, the age of majority of European British subjects was regulated by the English law, which fixed the limit of minority at the end of the twenty-first year.[1] The same limit applied to East Indians, Native Christians who had renounced the old law by which they were bound,[2] Jews,[3] and all persons other than Hindus and Mahomedans.

East Indians. Native Christians. Jews.

Illegitimate children.

The age of majority of the illegitimate children of native women by European British subjects or by other persons whose age of majority was determined by the English law, was determined by the Hindu, Mahomedan, or English law, according as they had been brought up as Hindus, Mahomedans, or Europeans.[4]

There has been much legislation in India affecting the age of majority.

The Hindu and Mahomedan laws current in Bengal with reference to the age of majority were recognised in Bengal by sec. 28 of Bengal Regulation X of 1793,[5] which declared that minority with respect to both Hindus and Mahomedans is limited to the expiration of the fifteenth year. That section was, however, rescinded by Bengal Regulation XXVI of the same year, by which[6] the minority of Hindu and Mahomedan proprietors of estates, paying revenue to Government, was declared to extend to the end of the eighteenth year.

Ben. Reg. X of 1793.

Ben. Reg. XXVI of 1793.

Act XL of 1858.

The next enactment, affecting the age of majority of Hindus and Mahomedans in Bengal, was Act XL of 1858.

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[1] *Rollo* v. *Smith*, 1 B. L. R. O. C. 10; *Sultan Chand* v. *Smyth*, 12 B. L. R., 358; *Bijenath Singh* v. *Reed*, 2 Morley's Digest 36; *Hearsey* v. *Girdharee Lal*, 3 N.-W. P. H. C. Rep., 338.

[2] See *Abraham* v. *Abraham*, 9 M. I. A., 199; and *Hogg* v. *Greenway*, 2 Hyde, 3; Coryton, 97.

[3] See *Musleah* v. *Musleah*, 1 Boulnois, 234. As to what is a European British subject, see *post*, p. 6, note 1 and note to Act VIII of 1890, sec 17, *post*, chap. viii.

[4] See *Myna Bayee* v. *Outaram*, 8 M. I. A., 400; on remand, 2 Mad. H. C. Rep., 196.

[5] The Regulation which established the Court of Wards.

[6] Sec. 2. The unrepealed portions of Regulation XXVI of 1793, were repealed by Act XXIX of 1871, save as therein provided. For the decisions under this Regulation, see Tagore Law Lectures, 1877, pp. 7 and 8.

That Act was passed for the purpose of making better provision for the care by the Civil Court of the persons and property of minors (not being European British subjects),[1] who had not been brought under the superintendence of the Court of Wards.[2]

Did not apply to Calcutta.

It did not apply to Calcutta, and therefore, did not affect the age of majority of persons resident in Calcutta, and possessing no property in the mofussil,[3] nor the age of majority in respect of contracts made in Calcutta by persons resident therein but possessing property in the mofussil.[4]

Definition of minor.

The 26th section of Act XL of 1858 was as follows: "For the purposes of this Act every person shall be held to be a minor who has not attained the age of eighteen years."

Applied, whether proceedings taken or not.

According to the decisions of the Bengal High Court the effect of this section was that whether or not proceedings had been taken under the Act with respect to the care of his person or property,[5] a person with respect to whose person or property proceedings could be taken under the Act was a minor for the purposes of the Act, *i.e.*, in respect of all matters affecting his person or property, until he should attain the age of eighteen years.[6]

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[1] See sec. 2. The Act applied not only to proprietors of land paying revenue to Government, but to all persons not being European British subjects. *Lakhikant Dutt* v. *Jagabandu Chuckerbutty*, 3 B. L. R., App. 79; 11 W. R., C. R. 561. As to what is a European British subject, see *Rollo* v. *Smith*, 1 B. L. R., O. C., 10. (This case was doubted by the referring Bench in *Rainey* v. *Nobocoomar Mookerjee*, 5 C. L. R., 543, but the question was not decided); *Archer* v. *Watkins*, 8 B. L. R., 372; *Sultan Chund* v. *Smyth*, 12 B. L. R., 358; *Bujeenath Sing* v. *Reed*, 2 Morl. Dig. 36 and Act X of 1882, sec. 4 (*u*).

[2] See the preamble to the Act.

[3] *Callychurn Mullick* v. *Bhuggobutty Churn Mullick*, 10 B. L. R., 231; 19 W. R. C. R., 110.

[4] *Mothoormohun Roy* v. *Soorendronarain Deb*, I. L. R., 1 Calc., 108; 24 W. R. C. R., 464.

[5] *Madhusudan Manjee* v. *Debigobinda Newgi*, 1 B. L. R., F. B., 49; 10 W. R., F. B., 36; *Abdool Hossein* v. *Luteefoonissa*, 11 W. R. C. R., 235; *Tarinee Pershad Sein* v. *Dwarkanath Rukhit*, 15 W. R. C. R., 452; *In the goods of Gunga Proshad Gosain*, 5 B. L. R., 81; *Lakikant Dutt* v. *Jagabandhu Chuckerbutty*, 3 B. L. R., App. 79; 11 W. R. C. R., 561.

[6] *Jadu Nath Mitter* v. *Bolye Chand Dutt*, 7 B. L. R., 607; and *Archer* v. *Watkins*, 8 B. L. R., 379. In a case referred to *In the goods of Gunga*

On the other hand, the High Court of the North-Western Provinces held that the section only operated in case proceedings had been taken,[1] and the High Court of Bombay came to a similar conclusion in construing the Bombay Minors Act (XX of 1864),[2] which contained a section,[3] identical with sec. 26 of Act XL of 1858.

The Bengal Court of Wards.

By the Bengal Court of Wards Act[4] which placed under the superintendence of the Court of Wards all minor proprietors of entire estates (other than proprietors who were subject to the jurisdiction as respects infants of a High Court) the word 'minor' was defined[5] as a person under the age of eighteen years.[6]

Madras law.

Madras Regulation V of 1804, which constituted a Court of Wards[7] for the Madras Presidency provided[8] that "where minors may succeed to heritable property, they shall not, in any case, be competent to take charge of, or to administer their own affairs during the period of their minority, and for the better understanding thereof the duration of minority shall, without exception, continue until the completion of the eighteenth year of age."

Bombay law.

Act XX of 1864 which was in force in the Bombay Presidency contained provisions similar to those of Act XL of 1858.[9]

Age of majority for special purposes.

To add to the complications of the law as to the age of majority before the passing of Act IX of 1875, there were

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Proshad Gosain, 5 B. L. R., 81, Mr. Justice Norman was of opinion that sec. 26 did not affect the testamentary capacities of those who had attained the age of majority according to Hindu and Mahomedan law. With respect to Hindus the Hindu Wills Act XXI of 1870, sec. 2, incorporating Act X of 1865, sec. 46, removed this difficulty; but it still remained in the case of Mahomedans until the passing of Act IX of 1875.

[1] *Damodar Das* v. *Wilayet Hossein*, I. L. R., 7 All., 763. See also *Noor Ahmed* v. *Lulta Pershad*, 2 N. W. P. H. C. R., 189.

[2] *Shivji Hasam* v. *Datu Mavji*, 12 Bom. H. C. R. 281; *Shiddesvar* v. *Ramchandrav*, I. L. R., 6 Bom., 463.

[3] Sec. 30.

[4] Act IV (B. C.) of 1870.

[5] Sec. 2.

[6] This Act was repealed by the Court of Wards Act 1879 (Act IX (B. C.) of 1879), sec. 3 of which defined a minor as a person who has not completed his age of 21 years, see *post*, p. 11.

[7] *Post*, chap. XXXV.

[8] Sec 4.

[9] *Ante*, p. 6.

several Acts fixing the age of majority for the special purposes of such Acts.[1]

Indian Majority Act.

In 1875 the Indian Majority Act (IX of 1875) was passed, as its preamble states, for the purpose of prolonging the period of nonage and attaining more uniformity and certainty respecting the age of majority in the case of persons domiciled in British India. It came into operation on the 2nd of June 1875.[2]

Extent of Act.

It extends to the whole of British India, and so far as regards subjects of Her Majesty, to the dominions of Princes and States in India in alliance with Her Majesty.[3]

Majority of persons under Court of Wards or of whom guardian appointed by Court.

As amended by Act VIII of 1890, sec. 52, the Act provides[8] that "every minor of whose person or property or both a guardian, other than a guardian for a suit within the meaning of Chapter XXXI of the Code of Civil Procedure,[4] has been or shall be appointed,[5] or declared by any Court of Justice[6] before the minor has attained the age of eighteen years,[7] and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards[8] before the minor has attained

[1] See the Succession Act (X of 1865), sec. 3, applied to Hindus by The Hindu Wills Act (XXI of 1870, sec. 6); the Limitation Act (IX of 1871), sec. 3; the Government Savings Bank Act (V of 1873), sec. 3; Indian Christian Marriage Act (XV of 1872), sec. 3; the N.-W. P. Land Revenue Act (XIX of 1873), sec. 3 (12).

[2] Sec. 1.

[3] Sec. 3.

[4] This exception was introduced by sec. 443 of Act X of 1877. Before the passing of that Act "Guardian" in sec. 3 of the Indian Majority Act was held to include a guardian for the suit *Satya Ghosal* v. *Satyanand Ghosal*, I. L. R., 1 Calc., 388.

[5] In *Birjmohun Lal* v. *Rudraperkash Misser*, I. L. R., 17 Calc., 944, it was held that a Collector appointed under sec. 12 of Act XL of 1858 is not a guardian within the meaning of sec. 3 of the Indian Majority Act, but in the case of *Rudrapokash Misser* v. *Bholanath Mookerjee*, I. L. R., 12 Calc., 612, which was a case with regard to the same minor, the Collector was treated as a guardian appointed by the Court. This question cannot arise under Act VIII of 1890.

[6] As to the mode of appointing and declaring a guardian, see *post*, chaps. xi and xiv.

[7] The words "before the minor has attained the age of 18 years" were added by Act VIII of 1890, sec. 2, in accordance with the decision of the Bengal High Court on this point in the case of *Stephen* v. *Stephen*, I. L. R., 8 Calc., 714; 10 C. L. R., 533; on appeal, I. L. R., 9 Calc., 901; and 13 C. L. R., 430.

[8] This amendment disposes of the question which arose in *Periya Sami* v. *Seshadri Ayyangar*, I. L. R., 3 Mad. 11.

that age shall, notwithstanding anything contained in the Indian Succession Act (No. X of 1865), or in any other enactment, be deemed to have attained his majority when he shall have completed the age of twenty-one years and not before."

The appointment or declaration of a guardian operates to extend the age of majority as soon as the order is made.[1]

Removal or death of guardian.

If a guardian be once appointed or declared the disability of minority will continue until twenty-one, although the guardian may die, be removed, or otherwise cease to act,[2]

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[1] There was a conflict of decisions under Act XL of 1858 on this question. In *Stephen* v. *Stephen*, I. L. R., 8 Calc., 714; 10 C. L. R., 533; on appeal, I. L. R., 9 Calc., 901; and 13 C. L. R., 430; the date of the issue of the certificate was held by Garth, C. J., and Cunningham, J., to operate as the date of the appointment of a guardian within the meaning of this section; but in the same case Wilson, J., pointed out that the delay was caused by the parties, and that it might have been possible to date the certificate as of the date of the grant. In *Chuneemul Johary* v. *Brojonath Roy Chowdhry*, I. L. R., 8 Calc., 967; 11 C. L. R., 315, Field and Macpherson, JJ., held that the making of the order and not the subsequent taking out of the certificate alters the age of majority. In *Girish Chowdhry* v. *Abdul Selim*, I. L. R., 14 Calc., 55, Mitter and Grant, JJ., followed *Chuneemul Johary* v. *Brojonath Roy Chowdhry*, and differed from *Stephen* v. *Stephen;* but in *Nowbat Roy* v. *Kedarnath*, I. L. R., 13 Calc., 219, Wilson and Porter, JJ., followed *Stephen* v. *Stephen*, in preference to *Chuneemul Johary* v. *Brojonath Roy Chowdhry*, and also agreed with *Sahainand* v. *Mungniram*, I. L. R., 12 Calc., 542. In *Harendra Narain Singh Chowdhry* v. *Moran*, I. L. R., 15 Calc., 40. Prinsep and Beverley, JJ., came to a conclusion, which is not consistent with *Stephen* v. *Stephen*. In Bombay, Sargent, C.J., and Nanabhai Haridas, J., in *Yeknath* v. *Warubai*, I. L. R., 13 Bom., 285, agreed with *Stephen* v. *Stephen*, but held that the principle of that case did not apply to the appointment of a guardian of the person as no certificate was there necessary. The decision of the Bengal High Court in *Sahainand* v. *Mungniram*, I. L. R., 12 Calc., 542, was reversed by the Privy Council in *Mungniram* v. *Gursahainand*, I. L. R., 17 Calc., 347, see p. 356; L. R., 16, I. A. 195, see p. 200, from which it seems that the order for a certificate would have been sufficient to increase the age of majority to 21 years, although the certificate had not actually issued. This question does not now arise, as under the Guardians and Wards Act VIII of 1890, no certificate is necessary, and therefore the moment the order is made, the age of majority is extended.

[2] *Rudraprokash Misser* v. *Bholanath Mookerjee*, I. L. R., 12 Calc., 612; *Khwahish Ali* v. *Surju Prasad Singh*, I. L. R., 3 All., 598. *Contra; Patesri Partap Narain Singh* v. *Champa Lal*, N.-W. P. W. N. 1891, p. 118; see also *Yeknath* v. *Warubai*, I. L. R., 13 Bom., 285.

and upon the same principle it would follow from the wording of the section, as amended, that even should the jurisdiction of the Court of Wards over the minor's property cease,[1] the disability of minority will continue until twenty-one.[2]

Express appointment necessary.

To effect an extension of the age of majority there must be an actual appointment or declaration of a guardian by a competent Court in accordance with the procedure provided by law. A grant of probate to a person, who has been appointed guardian by will, does not amount to an appointment of guardian by the Court, or affect the age of majority.[3]

Age of majority of other persons.

The Majority Act further provides[4] that "every other person[5] domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before."

Exceptions.

Nothing in the Majority Act affects[6]—

(*a*) the capacity of any person to act in the following matters (namely) marriage, dower, divorce,[7] and adoption ;[8]

(*b*) the religion or religious rites and usages of any class of Her Majesty's subjects in India ; or

(*c*) the capacity of any person who, before this Act came into force, had attained majority[9] under the law applicable to him.

This reservation refers only to the capacity to contract, and not to the capacity to sue, which is purely a question

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[1] Act IX (B. C.) of 1879, sec. 5.

[2] The section before it was amended by Act VIII of 1890, sec. 52, ran as follows—

"And every minor under the jurisdiction of any Court of Wards." Before the amendment it was held in *Birjmohun Lal* v. *Rudra Perkash Misser*, I. L. R., 17 Calc., 944, that under sec. 3 of the Majority Act, the disability of minority only continues so long as the Court of Wards retains charge of a minor's property.

[3] *Jogesh Chunder Chakravarti* v. *Umatara*, 2 C. L. R., 577

[4] Sec. 3.

[5] *i.e.*, every person other than those to whom the age is extended to 21 (*ante*, p. 9).

[6] Sec. 2.

[7] *Post*, chap. xxiii.

[8] *Post*, chap. ii.

[9] *i. e.*, majority for all purposes, and in all places in British India, *Rajcoomar Roy* v. *Alfuzudin Ahmed*, 8 C. L. R., 419.

of procedure and regulated by the Civil Procedure Code.[1] It is therefore necessary that a party to a suit with reference to his marriage, dower, divorce or adoption, should, if he be a minor within the meaning of the Indian Majority Act, be represented by a next friend or guardian for the suit as the case may be.[2]

Age of majority for purpose of particular Acts.

The effect of the Indian Majority Act is not universal, as it does not prevent the age of majority being fixed for particular purposes by particular enactments.[3] It is difficult to say what effect can be given to the words "notwithstanding anything contained in the Indian Succession Act (No. X of 1865) or in any other enactment."[4] Those words cannot have been intended to alter the definition of "minor" in all enactments prior to the Indian Majority Act,[5] and even if such was the intention of the Legislature, definitions in Acts passed subsequently to the Indian Majority Act must have full force.

Bengal Court of Wards Act.

The Court of Wards Act now in force in Lower Bengal[6] defines[7] a "minor" as "a person who has not completed his age of twenty-one years;" so it would follow that the Court of Wards could exercise the powers given to it by that Act over persons who had attained the age of eighteen years, and thus could, for the purposes of the Act, reduce them to pupilage. Apart from the purposes

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[1] *Ithayi Umah* v. *Kairkhira-pokil Mamod*, I. L. R., 3 Mad., 248. In *Sorabji Cawasji Polishvala* v. *Buchoobai*, I. L. R., 18 Bom., 366, it was held that in suits under sec. 30 of the Parsi Marriage Act (XV of 1865), parties under 21 years of age must be treated as minors, and represented by a next friend or guardian. The above Madras case was not referred to.

[2] *Post*, chap. xxv.

[3] See *Rainey* v. *Nobocoomar Mookerjee*, 5. C. L. R., 543.

[4] Sec. 3, *ante*, p. 9.

[5] In *Rainey* v. *Nobocoomar Mookerjee*, 5 C. L. R., 543, a Full Bench of the Bengal High Court held that in spite of the Indian Majority Act the age for purposes of limitation was 18 as fixed by the then Limitation Act (IX of 1871). The present Limitation Act (XV of 1877) does not define "minor" so now for purposes of limitation the age is as fixed by the Majority Act. In *Sarat Chundra Chakarbati* v. *Forman*, I. L. R., 12 All., 213, it was held that under sec. 3 of the Majority Act a person under the age of 18 is a minor within the meaning of Act IX of 1861. For instances of Acts passed before the Majority Act, in which a special age was fixed, see *ante*, p. 8, (note 1).

[6] Act IX (B.C.) of 1879.

[7] Sec. 3.

of the Act, their capacity would be regulated by the Indian Majority Act, but in this case the dual age of majority would cause little inconvenience, as the ward is incapable of charging his property,[1] and except with the leave of the Court a contract made by him cannot be enforced.[2]

When age of majority completed.

In computing the age of any person, the day on which he was born must be included as a whole day, and he is deemed to have attained majority, if he be under the jurisdiction of the Court of Wards, or if a guardian of his person or property has been appointed by a Court of justice at the beginning of the twenty-first anniversary of that day, and if he be not under the Court of Wards, and no guardian has been appointed of his person or property by a Court of justice at the beginning of the eighteenth anniversary of that day.[3] This is different from the English law, which in this respect was in force in India before the passing of the Indian Majority Act. By that law the last year of minority is looked upon as completed on the first instant of the day before the birthday, which closes that year.[4]

Persons not domiciled in British India.

The Indian Majority Act only applies to persons domiciled within the territories to which it extends. The age of majority of persons who are not so domiciled will, in respect of their capacity in British India, be determined by the law of their domicile.[5]

[1] See Act IX (B. C.) of 1879, sec. 60, *post*, chap. xxiii; *Balkrishna* v. *Mussuma*, I. L. R., 5 All., 142; L. R. 9 I. A., 182; *Collector of Benares* v. *Sheoprosad*, I. L. R., 5 All., 487.

[2] Act IV of 1892, sec. 13, *post*, chap. xxxiii.

[3] Act IX of 1875, sec. 4.

[4] See Simpson on Infants, 2nd Edn., 3; Macpherson on Infants, 447.

[5] *Rohilkund and Kumaon Bank* v. *Row*, I. L. R., 7 All., 490. *Contra*—; *Hearsey* v. *Girdharee Lal*, 3 N. W.-P. H. C. R., 338. See Act IX of 1872, sec. 11; *Sottomayer* v. *De Barros*, 3 P. D. 1, and 5 P. D. 94. The ordinary rule is that except in cases of marriage the capacity to contract is to be determined by the law of the place where the contract is made. see Dicey on Domicil 177; Westlake's International Law, arts. 89, 401, 404; Story's Conflict of Law, 7th Edn., sec. 241; Burge's Commentaries on Colonial and Foreign Laws, Edn. 1838, p. 132; (see, however, *Kashiba* v. *Shripat Narshiv*, I. L. R., 19 Bom., 697; *Sottomayer* v. *De Barros*, 3 P. D. 1 & 5 P. D. 94); but this rule has not been adopted by the Indian Legislature, see *per* Oldfield, J, in *Rohilkund and Kumaon Bank* v. *Row*, I. L. R., 7 All. at p. 501.

Domicile of minor. English law.

According to the English law the domicile of a legitimate child follows the domicile of his father, and after the death of the father that of his mother, except on her re-marriage. The domicile of an illegitimate child follows the domicile of the mother.[1]

Indian law: Legitimate child.

By the Indian Succession Act[2] the domicile of origin of every person of legitimate birth is in the country in which, at the time of his birth, his father was domiciled, or if he is a posthumous child, in which his father was domiciled at the time of the father's death.

Illegitimate child.

The domicile of origin of an illegitimate child is in the country in which, at the time of his birth, his mother was domiciled.[3]

Continuance of domicile of origin.

The domicile of origin prevails until a new domicile has been acquired.[4]

The domicile of a minor follows the domicile of the parent from whom he derived his domicile of origin.[5]

Change of domicile.

The domicile of a minor does not change with that of his parent, if the minor is married or holds any office or employment in the service of Her Majesty, or has set up, with the consent of the parent, in any distinct business.[5]

Minor wife.

By marriage a woman acquires the domicile of her husband, if she had not the same domicile before.[6] The wife's domicile during the marriage follows the domicile of her husband, except they be separated by the sentence of a competent Court, or the husband be undergoing a sentence of transportation.[7]

Except as above, a person cannot, during minority, acquire a new domicile.[8]

National status of minor children where parent becomes alien.

Where the father being a British subject, or the mother being a British subject and a widow becomes an alien in pursuance of the Naturalization Act 1870,[9] the minor

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[1] Dicey on Domicil, Pt. I, ch. 1, Rule 9. See *In re Beaumont* [1893] 3, Ch. 490.

[2] Act X of 1865, sec. 7.

[3] *Ibid*, sec. 8.

[4] *Ibid*, sec. 9.

[5] *Ibid*, sec. 14.

[6] *Ibid*, sec. 15.

[7] Act X of 1865, sec. 16. See *Kashiba* v. *Shripat Narshie*, I. L. R., 19 Bom., 697.

[8] Act X of 1865, sec. 17.

[9] 33 Vict., cap. 14.

children also cease to be British subjects. Similarly, when the parent resumes the position of a British subject the children also become British subjects.[1]

Extension of age of majority by testator.

Where a testator fixes an age subsequent to the age of majority as the age at which his beneficiary shall enjoy his legacy, and at the same time gives to the legatee an absolute vested interest in the legacy, the legatee is, according to English law,[2] entitled to payment of the legacy on attaining the age of majority. This rule is apparently applicable to this country.[3] A testator can postpone the vesting of his legacy,[4] but beyond this he would have no power to extend the age of majority of his beneficiary.

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[1] 33 Vict., cap. 14, sec. 10.

[2] See Williams on Executors, 8th Edn., p. 1403.

[3] *Lloyd* v. *Webb*, I. L. R., 24 Calc., 44. See, however, *Hurrosoondery* v. *Kistonath Roy*, 1 Fulton, 393.

[4] See Act X of 1865, sec. 107, applied to Hindus by Act XXI of 1870, sec. 2.

CHAPTER II.

Contracts and Disposal of Property.

Incapacity of minors.

As an old writer observes[1] with respect to the incapacity of minors, "the law protects their persons, preserves their rights and estates, excuseth their laches, and assists them in their pleadings; the judges are their counsellors, the jury are their servants, and the law is their guardian."

Fraud by minor.

Where, however, a minor is guilty of actual fraud, the Court will not afford to him that protection which his minority would otherwise entitle him to.[2] And where a minor induces another person to believe that he is an adult, and to act on such belief, the minor cannot take advantage of the plea of minority.[3]

Contracts.

With respect to contracts entered into by them, minors are up to the time they attain majority[4] under the special protection of the law, favoured in all things which are for their benefit, and not prejudiced by anything to their disadvantage.

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[1] The Infant's Lawyer, Lond., 1712. Sir Thomas Strange says that minors "in general will not be bound but by necessary acts, or such as are evidently for their benefit, the jealousy in their favour of the Hindu corresponding with that of the English law (Hindu Law, vol. i, 203).

[2] *Bristow* v. *Eastman*, 1 Espinasse Nisi Prius Cases 172, Macpherson on Contracts, 2nd Edn., p. 19.

[3] *Wright* v. *Snow*, 2 De Gex. & Smale 321; see Act I of 1872, sec. 115. The representation made by the minor must be an express one *Exp. Jones*, 18 Ch. D., 121.

[4] The age of majority for the purpose of contract must be determined, according to the domicile of the person, and therefore for the purpose of contract the age of majority of a person domiciled in British India must be determined by the Indian Majority Act (IX of 1875), *ante*, chap. i. The age of other persons must be determined by the law of their domicile: *Kashiba* v. *Shripat Narshir*, I. L. R., 19 Bom. 697. See *ante*, p. 12, *note* 5.

It is wholly immaterial whether the person contracting with a minor is aware of his minority or not.[1]

Before Indian Contract Act.

Before the passing of the Indian Contract Act,[2] the High Courts, in suits on contracts, administered the Hindu, Mahomedan, or English laws according to the nationality of the defendant. The Mofussil Civil Courts, in cases to which the Hindu and Mahomedan laws were not applicable, were directed to proceed according to justice, equity, and good conscience.[3]

With respect to the power of minors to contract, the Hindu, Mahomedan, and English laws, as administered by the Courts in India, differed very little from each other.

Under the Hindu law, a minor seems to have had no power to contract under any circumstances.[4] The Courts treated the deed or contract of a minor Hindu as not void, but only as voidable if against his interest.[5]

The Mahomedan law[6] and the English law, as administered in India, treated contracts made by minors in the same way. Under those laws the general rule was, that contracts made by a minor were not binding on him, but that he might take advantage of such contracts and sue on them if they were for his benefit. Further, if on coming of age he should ratify a contract, it would be binding upon him.[7]

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[1] *Barnes* v. *Toye*, 13 Q. B. D. at p. 414.

[2] IX of 1872.

[3] As to the law administered by the Courts in India, see the *Secretary of State* v. *Administrator-General of Bengal*, 1 B. L. R., O. C., 87; *Waghela Rajsangi* v. *Masudin*, I. L. R., 11 Bom. at p. 561; L. R., 14 I. A. at p. 96; *In the matter of Saithri*, I. L. R., 16 Bom., 323; *Varden Seth Sam* v. *Luckpathy Royjee*, 9 M. I. A., 307.

[4] 1 Strange's Hindu Law, 271; Menu, chap. viii, sloka 163; Vyavastha Darpana, p. 613; *Kallupnath Singh* v. *Kumlaput Jah*, 4 Sel. Rep., 339; 2nd edn., 432. *Pudawutee* v. *Kishoonmohun Banoorjeeah*, Ben. S. D. A., 1847, p. 25; *Yerlagudda Ramasawmy* v. *Guddum Lukshmanna*, Mad. S. D. A., 1849, p. 6.

[5] Macpherson on Contracts, 2nd edn., p. 21. See *O'Donnell* v. *Buddinath*, Morton 84; *Boiddonath Dey* v. *Ramkishore Dey*, 13 W. R. C. R., 166; 10 B. L. R., 326, *note*; *Doorgachurn Shaha* v. *Ram Narain Dass*, 13 W. R. C. R., 172; 10 B. L. R., 327, *note*; *Hari Ram* v. *Jitun Ram*, 3 B. L. R. A. C., 426; 12 W. R. C. R., 378; *Rennie* v. *Gunganarain Chowdhry*, 3 W. R. C. R., 10; *Mahomed Arif* v. *Saraswati*, I. L. R., 18 Calc., 259.

[6] Macpherson on Contracts, p. 20; and Macnaghten's Principles of Mahomedan Law, chap. iii, para. 11, chap. viii, para. 12.

[7] See *post*, chap. xxi as to ratification by a minor.

The Indian Contract Act,[1] which applies to all contracts of whatever nationality the contracting parties may be,[2] contains the following[3] :— Indian Contract Act.

"All agreements are contracts, if they are made by the free consent of parties competent to contract,[4] for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."

The same Act[5] declares that "every person is competent to contract who is of the age of majority according to the law to which he is subject,[6] and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."

The interpretation clause[7] of the Indian Contract Act gives the following definitions :—

"(*g.*) An agreement not enforceable by law is said to be void :

"(*h.*) An agreement enforceable by law is a contract :

"(*i.*) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract."

The decisions under these sections shew that the law has not been altered by the Indian Contract Act, and that since that Act, as before it, a contract made by a minor is not absolutely void, but is voidable by him, and can only be enforced against him, if it be ratified by him after he has come of age.[8] He can enforce such contracts, if they be for his advantage ;[9] but where he is suing either in

[1] Act IX of 1872.

[2] *Madhub Chunder Poramanick* v. *Rajcoomar Doss*, 14 B. L. R., 6 ; 22 W. R. C. R., 370.

[3] Sec. 10.

[4] See also Act I of 1872, sec. 92, proviso 1.

[5] Sec. 11.

[6] See *ante*, chap. i ; and *Mammi Mal* v. *Jagannath*, N.-W. P. W. N., 1887, p. 71.

[7] Sec. 2.

[8] *Sashibhusan Dutt* v. *Jadunath Dutt*, I. L. R., 11 Calc., 552 ; *Mahomed Arif* v. *Saraswati*, I. L. R., 18 Calc., 259 ; *Hanmant Lakshman* v. *Jayarao Narsinha*, I. L. R., 13 Bom., 50 ; *Beharilal* v. *Benilal*, I. L. R., 13 All., 408 ; *Krishna Sami* v. *Sundarappayyar*, I. L. R., 18 Mad., 415. *Contra*—*Fatima* v. *Debnauth Shah*, I. L. R., 20 Calc., 508 ; as to ratification see *post*, chap. xxi.

[9] In order to see whether a contract is to the advantage of a minor the whole of it must be looked at. *Corn* v. *Matthews* [1893], 1 Q. B., 310.

contract or tort, a contract made by him cannot be set up against him, unless it has been made to his advantage.[1]

Surety for minor.

Although a minor may not be himself liable on a contract, there is no reason why his surety should not be liable.[2] Similarly, an adult can be bound by a promise entered into by him jointly with a minor.[3]

Repudiation of contract.

A minor cannot, on coming of age, repudiate a contract entered into by him without restoring all benefits which he may have received by such contract, so far as it is possible for him to restore them.[4] Similarly, when a minor rescinds a contract made by him during his minority, and which has been partly executed, he is entitled to be restored to the position he would have occupied if the contract had not been entered into, and should the other party have received benefits to the detriment of the minor, the minor may be entitled to be compensated for such loss. Where the minor has received no benefit from the contract he is entitled to recover any money which may have been paid by him on account of it.[5]

Contract of agency.

A minor cannot appoint or employ an agent[6] or attorney,[7] nor can he authorize another person to do what he cannot do himself.[8] The acts, admissions, or statements, of an agent or attorney can be repudiated by the minor, and would not bind him unless they be ratified or accepted by him after he attains his majority.[9]

A minor may be appointed an agent, but he is not responsible to his principal for his acts in that

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[1] See *Flower* v. *London and North-Western Railway Company* [1894], 2 Q. B., 65; *Clements* v. *London and North-Western Railway Company* [1894], 2 Q. B., 482.

[2] *Kashiba* v. *Shripat Narshie*, I. L. R., 19 Bom., 697. See *Kallapnath Singh* v. *Kundapat Jah*, 4 Sel. Rep. 339, 2nd Edn., 432.

[3] See Act IX of 1872, sec. 43.

[4] Act IX of 1872, sec. 64. See *post*, chap. xxi.

[5] *Hamilton* v. *Vaughan Sherrin Electrical Engineering Company* [1894], 3, Ch. 589.

[6] Act IX of 1872, sec. 183.

[7] *Radhanath Bose* v. *Suttoprosonno Ghose*, 2 Ind. Jur. N. S., 269.

[8] *Bykuntnath Roy Chowdhry* v. *Pogose*, 5 W. R. C. R., 2.

[9] As to ratification of acts of guardians and other persons acting on behalf of minors, see *post*, chap. xxi.

behalf.[1] The principal is, however, bound by the acts of his minor agent to the same extent as if that agent had attained the age of majority, and was of full capacity.[2]

A minor managing member of a joint family has as much power to bind his co-parceners as an adult.[3] Minor managing member of joint family.

A contract to buy or to sell shares in limited companies is on the same footing as other contracts, and moreover the company can decline to recognise a minor, buying shares, as a shareholder.[4] A minor who inherits shares might be liable in respect of them to the extent, at any rate, of the property inherited by him from the person from whom he derives title to the shares. Although he may afterwards avoid the contract, the signature of a minor to the memorandum of association of a company is the signature of a person within the meaning of sec. 6 of the Indian Companies Act.[5] Shares in limited companies.

There are certain exceptions to the rule that a minor is not bound by contracts entered into by him.

A person who supplies a minor, or any one whom he is legally bound to support,[6] with necessaries suited to his condition in life is entitled to be reimbursed from the property of the minor,[7] whether such necessaries were supplied at the instance of the minor, or at that of his guardian.[8] Liability for necessaries.

Necessaries, suited to a person's condition in life, include such things as are reasonably required for the nourishment, clothing, lodging, education, health, and

[1] Act IX of 1872, sec. 184. He may be liable to be punished for criminal breach of trust. Act XLV of 1860, sec. 409, see *post*, chap. vi.

[2] Act IX of 1872, sec. 184.

[3] The rights of a minor managing member of an undivided Hindu family are recognised by Act VIII of 1890, sec. 21, *post*, chap. viii.

[4] See *In re Asiatic Banking Corporation*, L. R. 5 Ch., 298. As to the liability of an adult who takes shares in the name of a minor, see Buckley on Companies, 4th Edn., p. 69.

[5] VII of 1882. *In re Laxon* [1892] 3 Ch., 555.

[6] Such as his wife and children, see Ill. (*b*) to sec. 68 Act IX of 1872. This does not include members of his family, to support whom the minor is only under a moral, and not under a legal, obligation.

[7] Act IX of 1872, sec. 68.

[8] *Ranmalsingji* v. *Vadilal Vakhatchand*, I. L. R., 20 Bom., 61; *Juggessur Sircar* v. *Nilambur Biswas*, 3 W. R. C. R., 217.

decent behaviour and appearance of the minor according to his station, degree and fortune.[1]

There is nothing to prevent a minor from indulging in luxury, if he has the money to pay, and pays for it. But the question is whether it is so necessary for the purpose of maintaining himself in his station that he should have the particular articles, as to bring them within the exception under which a minor may pledge his credit for them as necessaries.[2]

What are necessaries.

The surrounding circumstances of each particular case furnish the only means for the solution of this question. The term "necessaries" primarily implies only suitable food, drink, clothing, lodging, instruction, and education for the minor in accordance with his position in life and his fortune, and articles purely of ornament and luxury would not be included in the term. But articles may be necessaries suitable to the degree in life and condition of the minor, even though of an ornamental or luxurious character, where the minor's fortune or prospects would justify their being so considered.[3]

In some cases special circumstances might bring under the term "necessaries" articles which generally could not be considered as such. For instance, where a doctor has ordered horse exercise for a minor, the hire or even the purchase of a horse may be necessary.[4] Presents to be given by the minor may in some cases be considered necessaries, as for instance where the minor is in a good position and buys the articles for the purpose of giving them to his intended bride.[5]

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[1] See judgment of Bramwell, B., in *Ryder* v. *Wombwell*, L. R., 3 Ex., 90, on appeal, L. R., 4 Ex., 32; as to necessary instruction see *Walter* v. *Everard* [1891] 2 Q. B. 369.

[2] *Ryder* v. *Wombwell*, L. R., 4 Ex., 32. As to what articles have been held to be necessaries, see Macpherson on Infants, pp. 499—501; and Simpson on Infants, 2nd Edn., pp. 90—92.

[3] If they are for mere ornaments, they cannot be necessaries. If they are for real use, they may be such: *Peters* v. *Fleming*, 6 M. & W., 46.

[4] *Hart* v. *Prater*, 1 Jur. 623.

[5] *Jenner* v. *Walker*, 19 L. T. N. S., 398.

Necessary legal expenses incurred either by the minor or on his behalf can be recovered from his estate[1] in a suit against him.

It has been held that money paid to release a minor from arrest,[2] or to save him from ejectment for non-payment of rent,[3] can be recovered as necessaries.

In some cases expenditure incurred obviously for the benefit of the minor, although not included in the ordinary use of the term "necessaries," would bind the minor's estate as being for necessaries within the meaning of the section. For instance, the marriage expenses of the minor, the funeral ceremonies of the wife, husband, or children of the minor,[4] and the performance of the *shrads* of the ancestors of the minor, or of such religious ceremonies as the minor, if he had been an adult, would be morally bound to perform.

Necessaries supplied to husband of female minor.

Though the Indian Contract Act[5] renders the estate of a minor husband liable for necessaries supplied to his wife, it does not contemplate any possibility of the estate of a minor wife being liable for necessaries supplied to her husband. A wife is not legally bound to support her husband; but the English rule of law, that the interest of a personal connection is sometimes regarded in law as that of the individual himself,[6] might, even in this country, render the estate of a minor wife liable for necessaries supplied to her husband, where her husband has no means of support.[7]

[1] *Sham Charan Mal* v. *Debya Singh*, I. L. R., 21 Calc., 872; *Watkins* v. *Dhunnoo*, I.L.R., 7 Calc., 140; 8 C. L. R., 43, *post*, chap. xxvi, *Helps* v. *Clayton*, 10 Jur. N. S. 1184 *Collins* v. *Brook*, 5 H. & N., 708.

[2] *Clark* v. *Leslie*, 5 Espinasse, 28.

[3] *Ex parte McKey*, 1 Ball. & Beatty, 405.

[4] *Chapple* v. *Cooper*, 13 M. & W., 252. The section contemplates the necessities of the minor's person rather than those of his estate.

[5] IX of 1872, sec. 68.

[6] See Broom's Legal Maxims. 5th Edn., p. 533.

[7] In *Chapple* v. *Cooper*, 13 M. & W., 259, 260. Alderson, B., said: "Now the law permits an infant to make a valid contract of marriage, and all necessaries furnished to those with whom he becomes one person by or through the contract of marriage are, in point of law, necessaries to the infant himself. Now there are many authorities which lay it down that decent Christian burial is a part of a man's own rights; and we think it is

Quantity.

Things, which in a small and reasonably sufficient quantity are necessaries, cease to be such, when supplied in a quantity over and above what is sufficient, and they equally cease to be such whether they are supplied by one tradesman only, or by a number of tradesmen.

The fact that a minor is already sufficiently supplied with goods of a similar description is an answer to a suit, and it is immaterial whether the plaintiff did or did not know of the existing supply.[1]

Duty of tradesman dealing with minor.

The rule of law, that a minor can be sued on a contract for necessaries only, is always construed for the benefit of the minor and not for that of the tradesman.[2] It is the duty of a tradesman dealing on credit with a minor to stand on his guard, and make every possible enquiry. Even then he supplies the goods at his own risk, as it is for him to consider what things, and what amount of such things, the minor is actually in need of for the purpose of keeping up his position in life.[3]

It has been held that a minor is equally liable for necessaries supplied to him, whether or not he has an

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no great extension of the rule to say that it may be classed as a personal advantage, and reasonably necessary to him. His property, if he leaves any, is liable to be appropriated by his administrator to the performance of this proper ceremonial. If then this be so, the decent Christian burial of his wife and lawful children, who are the *personæ conjunctæ* with him, is also a personal advantage, and reasonably necessary to him, and then the rule of law applies that he may make a binding contract for it. This seems to us to be a proper and legitimate consequence from the proposition that the law allows an infant to make a valid contract of marriage. If this be correct, then an infant husband or parent may contract for the burial of his wife or lawful children, and then the question arises whether an infant widow is in a similar situation * * * . We do not see why the contract for the burial of the husband should not be the same as a contract by the widow for her own personal benefit."

[1] *Barnes* v. *Toye*, 13 Q. B. D., 410; *Johnstone* v. *Marks*, 19 Q. B. D., 509.

[2] Bramwell, B., said in *Ryder* v. *Wombwell*, L. R., 3 Ex., 90: "It is not a law for the indemnity and defence of the infant who is sued merely, it is a law to deter people from trusting infants, and so save the latter from the consequences of the improvidence and inexperience natural to their age; an improvidence which would lead them into loss, though all their dealings were with honest people; an inexperience which causes them to be no match with rogues."

[3] See *Story* v. *Pery*, 4 C. & P., 527, *Brayshaw* v. *Eaton*, 7 Scott, 185.

allowance or income, from which he might have purchased such necessaries.[1]

Money supplied for necessaries.

Money supplied to a minor for the purpose of buying necessaries, and actually expended by him for that purpose is recoverable in the same way as the cost of necessaries supplied.[2]

The 68th section of the Indian Contract Act imposes a liability upon the minor's estate entirely independent of any contract by the minor; and it, therefore, follows that a person who obtains from a minor a bond, account stated, or bill of exchange[3] in relation to necessaries supplied, is not placed thereby in any better position.

Contract of partnership.

With respect to contracts of partnership entered into by minors, the Indian Contract Act[4] provides as follows:—

"*Section* 247.—A person who is under the age of majority, according to the law to which he is subject, may be admitted to the benefits of partnership,[5] but cannot be made personally liable for any obligation of the firm; but the share of such minor in the property of the firm is liable for the obligations of the firm.

"*Section* 248.—A person who has been admitted to the benefits of partnership under the age of majority, becomes, on attaining that age, liable for all obligations incurred by the partnership since he was so admitted, unless he gives public notice, within a reasonable time, of his repudiation of the partnership."[6]

The Act does not require private notices to the creditors of the firm, and, moreover, does not specify in what way

[1] *Burghast* v. *Hall*, 4 M. & W., 727; *Peters* v. *Fleming*, 6 M. & W., 42.

[2] See *Marlow* v. *Pitfield*, 1 Peere Williams 558; *Ranmal Singji* v. *Vadilal Vakhatchund*, I. L. R., 20 Bom., 70.

[3] *In re Soltykoff* [1891], 1 Q. B., 413. Act XXVI of 1881, sec. 26, *post*, p. 24

[4] Act IX of 1872. As to the liability of minors on whose behalf their guardians are carrying on ancestral trades. See *post*, chap. XVIII.

[5] This refers to a case where the minor consents to being admitted into the partnership. An infant of tender years cannot be introduced into a partnership. See *Petumdoss* v. *Ramdhone Doss*, Taylor, 279.

[6] As to the law on this subject before the passing of the Indian Contract Act, see *Prosunno Koomar Baral* v. *Sajudoor Rahman*, Ben. S. D. A. 1853, p. 525.

public notice is to be given. Presumably, the proper notice would be by advertisements in the gazettes or newspapers of the place where the business is carried on. Where there are no gazettes or newspapers at that place, it is very difficult to say what kind of public notice ought to be given, probably a notice by beat of drum, or in such other way as advertisements are generally made, would be sufficient. In any case the most effectual public notice that can be reasonably given is requisite.[1]

Work done and money paid.

A minor can recover for work and labour done by him and for money paid by him, and money had and received for his use.[2] He can also recover compensation for a non-gratuitous act done by him from the person enjoying the benefit of such act.[3]

Non-gratuitous act.

Negotiable instruments.

A minor may draw, indorse, deliver, and negotiate promissory notes, bills of exchange, and cheques, so as to bind all parties except himself.[4]

Deposit in Savings Bank.

Any deposit made by or on behalf of a minor in a Government Savings Bank, may be paid to him personally, if he made the deposit, or to his guardian for his use, if the deposit was made by any person other than the minor, together with the interest accrued thereon.

The receipt of any minor or guardian for money paid to him under this provision is a sufficient discharge therefor.[5]

Contract of service.

A minor can bind himself either as master or servant by a contract of service, provided it be not one manifestly to his disadvantage, but he may avoid such contract after he attains the age of majority.[6]

Labour contract.

Any person of the age of sixteen years or upwards may[7] enter into a contract to labour for hire in Lakhimpur, Sibsagar, Naugong, Darrang, Kamrup, Goalpara, Kachar,

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[1] See *Chundee Churn Dutt* v. *Eduljee Kowasjee Bijnee*, I. L. R., 8 Calc., 678.

[2] Simpson on the Law of Infants—2nd Edn., p. 115.

[3] Act IX of 1872, sec. 70.

[4] Act XXVI of 1881, sec. 26.

[5] Act V of 1873, sec. 10; see *Gazette of India*, 12th December 1874, p. 602.

[6] See Act XIV of 1882, 4th schedules, Nos. 64 and 65, *R.* v. *Petrox*, 4 T. R., 196.

[7] Act I of 1882, sec. 11, as amended by Act VII of 1893. This Act applies to Bengal, Assam, the North-Western Provinces, and Oudh.

Sylhet, and the Sonthal Pergannahs[1] otherwise than as a domestic servant.

The Indian Factories Acts[2] contain provisions for the protection of children under fourteen years of age[3] working in factories,[4] and provide for the inspection of factories, and for the examination of persons desirous of being employed, for the purpose of ascertaining their age.[5]

Employment of children in factories. Inspection of factories.

Act XI of 1891[6] contains the following—

No child shall be employed in any factory if he is under the age of nine years.

Employment of children.

No child shall be actually employed in any factory before five o'clock in the morning or after eight o'clock in the evening.

No child shall be actually employed in any factory for more than seven hours in any one day.

Every child who is actually employed in any factory for six hours in any one day shall be allowed an interval or intervals of rest[7] amounting in the aggregate to at least half an hour.

No occupier of a factory shall allow any child to clean any part of the mill-gearing or machinery of such factory while the same is in motion, or to work between the fixed and traversing parts of any self-acting machine while such

Prohibition of employment of child in certain dangerous work.

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[1] Reg. III of 1872, sec. 3, as amended by Reg. III of 1886.

[2] Acts XV of 1881 and XI of 1891.

[3] Act XV of 1881, sec. 2, as amended by Act XI of 1891, sec. 5.

[4] A "factory" is defined as any premises (other than indigo factories or premises situated on, and used solely for the purposes of, a tea or coffee plantation), wherein is carried on not less than four months in the whole in any one year, any process for, or incidental to, making, altering, repairing, ornamenting, finishing or otherwise adapting for use, transport, or sale, any article, or part of an article; and

(*a*) wherein steam, water or other mechanical power is used in aid of of any such process; and

(*b*) wherein not less than fifty (or any number below fifty and not less than twenty if the Local Government by notification in the Official Gazette so declare it with reference to any premises, or premises of any class) persons are on any day simultaneously employed in any manual labour in, or incidental to, any such process. Act XV of 1881, sec. 2. Act XI of 1891, secs. 3 and 18.

[5] Act XV of 1881, secs. 3, 4 & 5, as amended by secs. 5, 6, 7, 8 & 9 of Act XI of 1891.

[6] Section 9.

[7] Notice of the time and length of the interval must be posted up in a conspicuous part of the factory in English and in the vernacular. Act XI of 1891, sec. 9.

machine is in motion by the action of the steam engine, water-wheel or other mechanical powers as the case may be.

Register of children in factory.

The Local Government may direct any occupier of a factory to keep, in such form and with such particulars as such Government may, from time to time, prescribe, registers of the children (if any) employed in such factory, and of their respective employments.

Employment in more than one factory.

No occupier of a factory shall employ therein any child who has to his knowledge already been employed in the same day in any other factory.

Penalties.

As to the penalties for breach of these rules, see Act XI of 1891, secs. 14 and 15, and Act XV of 1881, sec. 16.

Recognizance.

A minor of sufficient intelligence may be required to execute a bond to prosecute or to give evidence[1] and would be bound thereby.[2]

Contracts of marriage.

The capacity of minors to enter into marriage contracts is discussed in a subsequent chapter.[3]

Specific performance of agreements.

A minor cannot sue for specific performance of an agreement, entered into by him[4] even although the agreement, if executed, would have been such as to bind him or his estate.[5] He cannot be sued for specific performance of an agreement entered into by him,[6] nor can any relief ancillary to such specific performance be granted against him.[7]

Minor Insolvent.

It has been held that a minor cannot petition for the benefit of the Insolvent Act,[8] and that he cannot be adjudicated an insolvent[9] unless he has made an express representation to the adjudicating creditor that he is of full age,[10] but it is submitted that in respect of debts for

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[1] See *post*, chap. v.

[2] See Act X of 1882, sec. 217.

[3] Chapter XXIII.

[4] *Fatima* v. *Debnath Shah*, I. L. R., 20 Calc., 508, following—*Flight* v. *Bolland*, 4 Russ. 298. *See* Act I of 1877, sec. 4, para. (*a*). *Jugul Kishori* v. *Anundan Lal*, I. L. R., 22 Calc., 545; and *Krishnasami* v. *Sundarappayyar*, I. L. R., 18 Mad., 415.

[5] As for instance an arrangement for the supply of necessaries.

[6] As to specific performance of agreements entered into by guardians, see *post*, chap. xvii.

[7] *Lumley* v. *Ravenscroft* [1895], 1 Q. B., 683.

[8] 11 & 12 Vict., Cap. 21. *In re Hansraj Malji*, I. L. R., 7 Bom., 411.

[9] *In re Nobodeep Chunder Shaw*, I. L. R., 13 Calc., 68; *Exp. Jones*, 18 Ch. D., 109; *Lovell and Christmas* v. *Beauchamp* [1894], A. C., 611.

[10] *In re Hansraj Malji*, I. L. R., 7 Bom., 411. See *ante*, p. 15.

which he or his estate is liable such as debts for necessaries,[1] and damages for wrongful acts committed by him[2] a minor is not precluded from obtaining the relief which the insolvency law gives to adults, and that a creditor, who is such on account of debts which bind the minor, should be able to take advantage of the Act.

A minor is not liable for an act of insolvency committed by a guardian on his behalf.

Goods of minor in order and disposition of insolvent.

The goods and chattels of a minor which are in the possession, order, or disposition of an insolvent do not, as in the case of those belonging to adults,[3] become vested in the Official Assignee.[4]

There seems to be no reason why the insolvency Procedure[5] of the Civil Procedure Code should not apply to minors.[6]

Contracts by persons who have recently attained majority. Disposal of property.

The protection which the law affords to minors in respect of contracts entered into by them is in some cases extended to persons who have recently attained the age of majority. When they are disposing of their property to the advantage of others, it must be shewn that they are fully aware of the nature and effects of the transaction.[7]

Unconscionable bargains with persons who have recently attained majority

Where an unconscionable bargain is made with a young man who has just attained the age of majority, the Court will set aside the transaction.

In a case,[8] where a young man who was possessed of property, and who had attained his majority one year and one or two months before the transaction, borrowed a sum of money from a professional money-lender, and agreed by his bond to repay the principal with interest

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[1] *ante*, p. 19.

[2] *Post*, chap. vi.

[3] 11 & 12 Vict., Cap. 21, sec. 23.

[4] *In re Mills Trusts* [1895], 2 Ch., 564.

[5] Act XIV of 1882, chap. xx.

[6] The English cases proceed upon the minor not being liable for the debt, and cannot apply to the insolvency procedure of the Civil Procedure Code which only deals with judgment-debtors.

[7] See *Grosvenor* v. *Skerratt*, 28 Beav. 65. As to transactions between minors and their guardians, see *post*, chap. xv.

[8] *Mothoormohun Roy* v. *Soorendro Narain Deb*, I. L. R., 1 Calc., 120. See *Azimuddin Khan* v. *Zia-ul-Nissa*, I. L. R., 6 Bom., 309; *Moti Gulabchand* v. *Mahomed Mehdi Tharia Topan*, I. L. R., 10 Bom., 367.

at 36 per cent. per annum, the High Court of Bengal held, that the money-lender was only entitled to a decree for the amount actually advanced by him, with interest at 6 per cent.

With reference to the protection thus afforded by the Court, Lord Selborne, in the case of *Aylesford* v. *Morris*,[1] said: "It is sufficient for the application of the principle, if the parties meet under such circumstances as, in the particular transaction, to give the stronger party dominion over the weaker; and such power and influence are generally possessed, in every transaction of this kind, by those who trade upon the follies and vices of unprotected youth, inexperience, and moral imbecility.

"In the cases of catching bargains with expectant heirs, one peculiar feature has been almost universally present; indeed, its presence was considered by Lord Brougham to be an indispensable condition of equitable relief, though Lord St. Leonards, with good reason, dissents from that opinion. The victim comes to the snare (for this system of dealing does set snares, not, perhaps, for one prodigal more than another, but for prodigals generally as a class) excluded, and known to be excluded, by the very motives and circumstances which attract him, from the help and advice of his natural guardians and protectors, and from that professional aid which would be accessible to him, if he did not feel compelled to secrecy. He comes in the dark, and in fetters without either the will or the power to take care of himself and with nobody else to take care of him. Great judges have said that there is a principle of public policy in restraining this."

Transfer of property.

Transfers of property whether moveable or immoveable and whether by way of sale, mortgage, lease, or gift, are on the same footing as other contracts entered into by minors.

There is text-book authority to shew that the Hindu law treated them as void;[2] but the Courts have treated

[1] L. R., 8 Ch. 491.

[2] Chatterjee's Tagore Law Lectures 1886, p. 146. See *ante*, p. 16

them as voidable[1] in the same way as contracts, and the Transfer of Property Act[2] places them[3] on the same footing as contracts.[4]

Avoidance.

A minor, who has received benefits by a transfer cannot avoid it without placing the transferree in the position which he occupied at the time of such transfer.[5]

Acquiescence and ratification.

As to where acquiescence and ratification will be taken to bar the avoidance of a transfer, see *post*, Chapter XXI.

Registration of document executed by minor.

When a document, purporting to be executed by a person who appears to be a minor, is presented for registration, it is the duty of the registering officer to refuse to register it[6] so far as that person is concerned.[7]

Registration of transfers of tenant right.

There is a similar duty cast upon the Registrar of Mutations appointed under the Land Records Maintenance Act.[8]

It has, however, been held that the mere fact that an executant is a minor does not, in the absence of fraud, vitiate the registration.[9]

Gifts.

According to English law a gift by a minor, although ordinarily revocable, will not be set aside if there

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[1] *Mahomed Arif* v. *Saraswati*, I. L. R., 18 Calc., 259; *Boiddonath Dey* v. *Ramkishore Dey*, 13 W. R. C. R., 166; 10 B. L. R., 326 note; *Doorgachurn Shaha* v. *Ramnarain Dass*, 13 W. R. C. R., 172; 10 B. L. R., 327 note; *Hari Ram* v. *Jitan Ram*, 3 B. L. R., A. C., 426; 12 W. R. C. R., 378; *Rennie* v. *Gunganarain Chowdhry*, 3 W. R. C. R., 10.

[2] Act IV of 1882, sec. 7. This Act has since the 1st of January 1893 been extended to the Bombay Presidency, to which it did not before apply.

[3] A transfer of property is defined by the Act (sec. 5) as an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself or one or more other living persons.

[4] *Ante*, pp. 17 & 18.; *Mahomed Arif* v. *Saraswati*, I. L. R., 18 Calc., 259.

[5] *Post*, chap. xxi.

[6] Act III of 1877, sec. 35, see sec. 32, which (see definition of representative, sec. 3) allows a guardian to present for registration documents executed by a minor. The object of sec. 35 is that if the registering officer refuses to register on the ground of minority, the question of minority may at once be brought before a civil court and there determined. *Chuneemull Johary* v. *Brojonath Roy Chowdhry*, I. L. R., 8 Calc., 967.

[7] *Muhammad Enaz* v. *Birjlull*, I. L. R., 1 All., 465.

[8] Act III (B. C.) of 1895, sec. 14.

[9] *Sham Charan Mal* v. *Debya Singh*, I. L. R., 21 Calc., 872.

be an entire absence of any influence,[1] if the minor be not injuring himself by the gift, and if in other respects, it be one which a person of age, after full consideration, might reasonably be expected to make.[2]

According to Hindu[3] and Mahomedan law[4] a minor cannot make a valid gift.

Wills of minors.

Except that a Mahomedan governed by the Shia law, who is ten years of age, and is capable of discernment can make a will for proper purposes,[5] no minor can dispose of his property by will.[6]

Adoption by minor.

A minor[7] who has arrived at the age of discretion, can, under the Hindu law make a valid adoption or give a valid permission to adopt.[8]

The fact of a widow's minority affords no objection to an adoption otherwise validly effected by her.[9]

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[1] As to gifts to guardians see *post*, chap. XV.

[2] See *Taylor* v. *Johnston*, 19 Ch. D., 603.

[3] Macnaghten's Hindu Law, Vol. II, p. 119 note, Edn. 1828.

[4] Ameer Ali's Mahomedan Law, Vol. i, p. 41.

[5] Baillie's Mahomedan Law, Part II, p. 232. Ameer Ali's Mahomedan Law, Vol. i, p. 470.

[6] Act X of 1865, sec. 46, applied to Hindus by Act XXI of 1870, sec. 2. Ameer Ali's Mahomedan Law, Vol. i, p. 471. In a contest as to whether an alleged testator was a minor or not the burden of proof is on the person alleging majority, see *post* chap. XXIX. As to the power of minor fathers to appoint guardians by will, see *post*, chap. ix.

[7] *i.e.*, a minor according to Hindu Law, *ante* pp. 1 & 2. The Indian Majority Act (IX of 1875) does not apply to matters of adoption.

[8] *Jumoona* v. *Bamasoondari*, I. L. R., 1 Calc., 289; L. R., 3 I. A., 72 and 25 W. R. C. R., 235; *Rajendranarain Lahoree* v. *Saroda Soonduree*, 15 W. R. C. R., 548. *Vandravan Jekisan* v. *Manilal Chunilal*, I. L. R., 15 Bom., 565. See Golap Chandra Sarkar's Law of Adoption, p. 107 *et. seq.* As to the restriction of his powers by the person through whom the minor receives property, see *Hurrosoondery* v. *Kistonath Roy*, 1 Fulton, 393. As to adoption by wards of the Bengal Court of Wards, See Act IX (B. C.) of 1879, sec. 61 *post*, chap. xxxiii.; by wards of the Madras Court of Wards see Mad. Reg. V. of 1804, sec 25. *post*, chap. xxxv.

[9] Rattigan on Adoption, p. 30; Shamachuru's Vyavastha Durpana, p. 770; *Monkadinee* v. *Adinath Dey*, I. L. R., 18 Calc., 69; *Vandravan Jekisan* v. *Manilal Chunilal*, I.L.R., 15 Bom., 565.

CHAPTER III.

Acquisition of Property by Transfer, Gift, Inheritance, or Will.

Transfer to minor.

A TRANSFER to a minor whether by way of sale mortgage,[1] lease, or gift, will be upheld, if for his benefit.

Gift to minor.

A minor can accept a gift, but his acceptance is voidable.

Mahomedan law.

Under Mahomedan law there can be no valid gift without an actual change of possession ;[2] but, in the case of a gift to a minor, possession by the guardian, or by a trustee on behalf of the minor, or by a person acting as such[3] is sufficient.[4] Possession by a minor who has arrived at years of discretion will also validate the gift.[5] When the guardian is himself the donor, no formal delivery or change of possession is necessary, provided that it appear that there is on his part a real and *bonâ fide* intention to make a gift to the minor.[6]

Hindu Law.

Under the Hindu Law a gift to a minor is valid provided on his coming of age he exercise ownership over it.[7]

Gift burdened by obligation.

A minor donee, who accepts property burdened by any obligation is not bound by his acceptance, but if, after,

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[1] *Behari Lal* v. *Beni Lal*, I. L. R., 3 All., 408.

[2] Macnaghten's Mahomedan Law, Principles chap. v, princ. 1.

[3] *Banoo* v. *Fakhrooddeen Hassan*, 2 Sel. Rep., 180, 2nd Edn., 230.

[4] *Mohinuddin* v. *Manchershah*, I. L. R., 6 Bom., 650; *Wajeed Ali* v. *Abdool Ali*, W. R., 1864, C. R., 121; Macnaghten's Mahomedan Law, Precedents, chap. iv, cases 19, 20 and 21.

[5] Baillie's Mahomedan Law, Part I, p. 531.

[6] *Ameeroonissa Khatoon* v. *Abadoonissa Khatoon*, L. R., 2 I. A. , 87; 15 B. L. R., 67 ; and 23 W. R. C.R., 208; *Gyazoodeen Hyder* v. *Fatima*, 1 Agra H. C. Rep. 238; Macnaghten's Mahomedan Law, Principles. chap. v, princs. 9 and 10.

[7] Macnaghten's Hindu Law, vol. ii, chap. viii, case 36, pp. 243 244.

attaining majority, and being aware of the obligation he retains the property given, he becomes so bound.[1]

May take by devise or bequest.

Minors (including infants in the womb) are not incapacitated from taking by devise or bequest. Acceptance will be presumed unless such presumption will work injury to the devisee or legatee.[2] A minor can also take by succession.

Bound by acts of predecessor in title.

A minor heir or legatee is bound by a contract or by conditions annexed to the property to which he succeeds, or which have been imposed thereon by the person from whom he takes, unless they be such as cannot have been intended to apply to a minor.[3]

As in the case of an adult a minor is bound by the acts of the person, to whose property he succeeds either as heir, legatee or donee.[4]

Gift or legacy to minor may be paid to Official Trustee.

If any minor is entitled to a gift or legacy or residue or share thereof, the executor or administrator by whom such legacy, residue or share is payable or transferable, or the party by whom such gift is made, or any trustee of such gift, legacy, residue or share, may, with the leave of the High Court of Bengal, Madras or Bombay, previously obtained by motion made on petition, pay or transfer the same to an Official Trustee.[5]

Payment of legacy into Court.

Where, by the terms of a bequest, the legatee is entitled to the immediate payment or possession of the money or thing bequeathed, but is a minor ; and there is no direction in the will to pay it to any person on his behalf, the executor or administrator must pay or deliver the same into the Court of the District Judge,[6] by whom, or by whose District Delegate the probate was, or letters of administration with the will annexed were granted, to the account of the legatee, unless the legatee be a ward of the Court of Wards ;

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[1] Act IV of 1882, sec. 127.

[2] Jarman on Wills, 5th Edn., pp. 74, 75.

[3] Simpson on Infants, 2nd Edn., pp. 78 to 82.

[4] Simpson on Infants, 2nd Edn., p. 82.

[5] Act XVII of 1864, sec. 32.

[6] Act X of 1865, sec. 2, and Act X of 1881, sec. 3, define a "District Judge" as the judge of a principal Civil Court of Original Jurisdiction.

and if the legatee be a ward of the Court of Wards the legacy must be paid into that Court to his account. Such payment into the Court of the District Judge, or into the Court of Wards, as the case may be, is a sufficient discharge for the money so paid.[1]

Such money when paid in shall be invested in the purchase of Government securities, which, with the interest thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit as the Judge or the Court of Wards, as the case may be, may direct.[1]

Wrongful possession of property to which minor entitled to succeed.

Whenever a person dies leaving property, moveable or immoveable, and the person entitled by succession to such property is a minor, any agent, relative, or near friend, or the Court of Wards in cases within their cognisance, may, either after actual possession has been taken by another person, or when forcible means of seizing possession are apprehended, apply to the Judge of the Court of the District, where any part of the property is found, or situate, for relief.[2]

The Judge, on being satisfied by evidence that there are strong reasons for believing that the party in possession or taking forcible means for seizing possession has no lawful title, and that the minor is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a regular suit, and that the application is made *bonâ fide*,[3] shall cite the party complained of and give notice of vacant or disturbed possession by publication, and after the expiration of a reasonable time,

[1] Act X of 1865, sec. 308. Act V, of 1881, sec. 127. Act VI of 1881, sec. 8. In the case of a legacy, to the immediate payment of which the legatee is entitled, this provision apparently conflicts with the power to pay the money to the Official Trustee, but in practice there would be no such conflict as, if the money had been paid to the Official Trustee, the Court would not insist on the executor or administrator paying it into Court.

[2] Act XIX of 1841, secs. 1 & 2. There is nothing in this Act to limit the territorial extent of its operation, but the fact that the Judge, if he does not act in conformity with the report of the Collector, must forward a statement of his reasons to the Court of Sadar Diwani Adalut (sec. 8) seems to shew that the Act was not intended to apply to Presidency Towns.

[3] Act XIX of 1841, secs. 3 & 4.

shall determine summarily the right to possession (subject to a regular suit by either party)[1] and shall deliver possession accordingly.[2]

Appointment of Curator.

The Judge is further empowered to appoint one or more curators to have the custody of such property during the pendency of such summary suit,[3] provided that when a Public Curator has been appointed for his district the Judge is bound to nominate the Public Curator,[4] curator of such property.[5]

Administrator-General ordered to take out letters of administration.

The Administrator-General's Act[6] gives to a High Court power to direct the Administrator-General to apply for letters of administration of the effects of any person, who dies leaving assets within the local limits of its ordinary original civil jurisdiction, when the Court is satisfied that danger is to be apprehended of the misappropriation, deterioration, or waste of such assets unless letters of administration are granted. The application to the Court for such direction may be made by a friend of a minor interested in such assets, either as creditor, legatee, next-of-kin, or otherwise.

The High Courts have also power,[7] in cases where such danger is apprehended, to authorize and enjoin the Administrator-General to collect and take possession of such assets and to hold or deposit and invest the same until the right of succession or administration is ascertained.

Letters of Administration when minor, sole executor, or residuary legatee.

The Indian Succession Act,[8] which applies to the wills of all persons other than Hindus, Mahomedans and Buddhists,[9] contains the following :—

"*Section* 215.—When a minor is sole executor or sole residuary legatee, letters of administration, with the will

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[1] Act XIX of 1841, secs. 4 & 17.

[2] *Ibid*, sec. 4.

[3] *Ibid*, sec. 5. As to the powers and duties of such curators, see that Act. The Judge cannot make an order under this section, unless the conditions, which justify his citing the party complained of, exist. *Papamma* v. *Collector of Godavari*, I. L. R., 12 Mad., 341.

[4] See *Sakhawat Ali* v. *Nurjehan*, I. L. R., 10 Calc., at p. 431.

[5] Act XIX of 1841, sec. 19

[6] II of 1874, sec. 17.

[7] Act II of 1874, sec. 18.

[8] X of 1865.

[9] Sec. 331.

annexed, may be granted to the legal guardian[1] of such minor or to such other person as the Court shall think fit until the minor shall have completed the age of 18 years, at which period, and not before, probate of the will may be granted to him.

"*Section* 216.—When there are two or more minor executors and no executor who has attained majority, or two or more residuary legatees and no residuary legatee who has attained majority, the grant shall be limited until one of them shall have completed the age of 18 years."[2]

The Probate and Administration Act[3] which applies to Hindus, Mahomedans, Buddhists, and persons exempted under sec. 332 of the Indian Succession Act by the Governor-General in Council,[4] contains the following similar provisions :—

"*Section* 31.—When a minor[5] is sole executor or sole residuary legatee, letters of administration with the will annexed may be granted to the legal guardian[1] of such minor, or to such other person as the Court shall think fit, until the minor has attained his majority, at which period, and not before, probate of the will shall be granted to him.

"*Section* 32.—When there are two or more minor executors and no executor who has attained majority, or two or more residuary legatees and no residuary legatee who has

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[1] This would include a guardian appointed by a Civil Court, or a Court of Wards, or a natural or testamentary guardian.

[2] Although the age of 18 is here specified, the effect of the Indian Majority Act, sec. 3 (*ante* p. 8), will apparently be to prevent probate being granted to a person who under that Act does not attain majority until 21. Probate or letters of administration could not be granted to persons, who are in the charge of others, are incapable of contracting, and are otherwise under disability.

[3] Act V of 1881.

[4] Native-Christians of the province of Coorg have been so exempted.—*Gazette of India*, July 25th, 1868, p. 1094.

[5] *i.e.*, any person subject to the Indian Majority Act 1875 (*ante* p. 8), who has not attained his majority within the meaning of that Act, and any other person who has not completed his age of eighteen years" Act V of 1881, sec. 3. "Other person" in this section includes a person not domiciled in British India. *In the goods of Sewnarain Mahata*, I. L. R., 21 Calc., 911.

attained majority, the grant shall be limited until one of them has attained his majority.

Administration for use and benefit of minor.

"*Section* 33.—If a sole executor or a sole universal or residuary legatee, or a person who would be solely entitled to the estate of the intestate according to the rule for the distribution of intestate's estates, applicable in the case of the deceased, be a minor * *, letters of administration with or without the will annexed, as the case may be, shall be granted to the person to whom the care of his estate has been committed by competent authority, or if there be no such person, to such other person as the Court thinks fit to appoint, for the use and benefit of the minor * *, until he attains majority." * * *

Power of administrator during minority.

An administrator during minority has all the powers of an ordinary administrator, and the minority is the only limit to his authority.[1]

Practice of High Courts.

The High Courts grant letters of administration to the guardians of minor heirs, *pendente minore ætate*, for the use and benefit of the minors but only in cases where such grant is necessary.[2]

Renunciation of Probate.

A guardian is not obliged to apply for administration on behalf of his ward. He may on his ward's behalf renounce probate or administration.[3]

Succession certificate.

A guardian may obtain a succession certificate in respect of property inherited by his ward.[4]

District Courts in Bombay

In the Bombay Presidency the District Courts can appoint an administrator when the heir or executor is a minor.[5]

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[1] *Cope* v. *Cope*, 16 Ch. D., 49.

[2] *In the goods of Hurry Dass Bonnerjee*, I. L. R., 4 Calc., 87. See Coote's Common Form Practice, 8th Edn.. p. 135.

[3] Coote s Common Form Practice, 8th Edn., p. 218.

[4] See Act VII of 1889. *Kalicoomar Chatterjee* v. *Taraprosono Mookerjee*, 5 C. L. R., 517; *Rama Reddi* v. *Papi Reddi*, I. L. R., 19 Mad., 199.

[5] Bom. Reg. VIII of 1827, sec. 9.

CHAPTER IV.

Offices of Public and Private Trust.

As minors are incapable of managing their own affairs, it follows that they are incapable of managing those of others, and that they cannot hold offices of public or private trust.

The following are instances of this principle :—

Juror. A person under the age of twenty-one years cannot, if objected to, serve as a juror.[1]

Calcutta Municipality. The members of the Corporation of Calcutta must be men, who have attained the age of twenty-one years,[2] and no one under that age can vote at the election of commissioners.[3]

Mofussil Municipalities in Bengal. Bengal Local Boards. Similar qualifications are required for commissioners and voters in mofussil municipalities in Bengal,[4] and for members of Local Boards in Bengal and persons entitled to vote at the election of such members.[5]

Madras village service. A minor is not eligible for appointment to a Village Office under the Madras Proprietory Estates Village Service Act,[6] or under the Madras Hereditary Village Offices Act.[7]

Madras Municipality. For the Madras Municipality a candidate must have completed his twenty-fifth,[8] and a voter his twenty-first year.[9]

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[1] Act X of 1882 sec. 278 (*b*).

[2] Act II (B.C.) of 1888, sec. 4.

[3] *Ibid*, sec. 8.

[4] Act III (B.C.) of 1884, secs. 14 and 15, Rules 2 and 15 of rules of 14th August 1889.

[5] Act III (B.C.) of 1885, secs. 9 and 13.

[6] Act II (M.C.) of 1894, sec. 10. As to the appointment of a person in place of the minor, see secs. 10 (3) and 13.

[7] Act III (M.C.) of 1895, secs. 10 and 11, which see as to the filling up of the vacancy.

[8] Act II (M.C.) of 1892, sec. 5.

[9] Act I (M.C.) of 1884, sec. 9.

Madras District Municipalities.

The Governor in Council can frame rules for the qualifications of candidates and electors in the case of Madras District Municipalities.[1]

N.-W. P. Local Boards and Municipalities.

In the North-Western Provinces also the qualifications of members of Local Boards[2] and Municipalities[3] is left to the Local Government.

Bombay Local Boards and District Municipalities.

In Bombay no person under twenty-one years of age may be a member, or vote for a member, of a Local Board[4] or of a District Municipality[5] or of the Municipality of Bombay.[6]

Hereditary offices in Bombay.

In the Bombay Presidency the Collector must refuse to accept the service of any representative wátándár or of any person nominated by a representative wátándár to be his deputy, if such representative wátándár or person is under eighteen years of age,[7] in which case his guardian can act for him.[8]

There is a similar provision in respect of matádárs.[9]

Attorney.

No person can be admitted as an attorney until he is twenty-one years of age.[10]

Sajjadanashin and mutwali.

A minor[11] cannot be appointed a sajjadanashin of a shrine or apparently a mutwali; but if the person, upon whom the office of mutwali devolves in consequence of a provision in the waqfnama, is a minor, the Court can appoint some one to perform his duties during his minority.[12]

Minor trustee.

A minor may be appointed a trustee; but he cannot exercise any power which requires the application of prudence or discretion,[13] unless the document which creates

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[1] Act IV (M.C.) of 1884, sec. 250.

[2] Act XIV of 1883, sec. 6.

[3] Act XV of 1883, sec. 10.

[4] Act I (Bo.C.) of 1884, secs. 11 and 19.

[5] Act II (Bo.C.) of 1884, secs. 16 and 22

[6] Act III (Bo.C.) of 1888, secs. 11 and 14.

[7] Act III (Bo. C.) of 1874, sec. 45, as amended by Act V (Bo. C.) of 1886, sec. 9.

[8] Act III (Bo. C.) of 1874, sec. 37

[9] Act VI (Bo. C.) of 1887, secs. 23 and 30.

[10] Belchambers's Practice 456.

[11] *i.e.*, according to Mahomedan law, *ante*, p. 2.

[12] *Piran* v. *Abdool Karim*, I. L. R., 19 Calc., 203. Ameer Ali's Mohamedan Law, vol. I, p. 350.

[13] Simpson on Infants, 2nd Edn., p. 41; *King* v. *Bellord*, 1 Hemming and Miller, 343, see Act II of 1882, sec. 10.

the trust expressly authorises the exercise of the power during minority.[1]

He is not civilly liable for a breach of trust[2] in respect of moneys received by him as an executor or trustee.[3]

Under the Indian Trusts Act,[4] sec. 60, a beneficiary may insist upon the appointment of an adult trustee.

Appointment of new trustee by High Courts.

In cases to which the English law is applicable,[5] a High Court may, within the local limits of its extraordinary original civil jurisdiction[6] by an order on a petition[7] appoint new trustees in place of minor trustees,[8] but such appointment would generally be without prejudice to an application by the minor to be restored to the trusteeship on attaining majority.[9]

In other cases, such appointment may be made in a suit.[10]

The Indian Trustee Act[11] contains the following provision with respect to minor trustees in cases to which the English law is applicable.[12]

High Court may convey estates of minor trustees and mortgagees.

"*Section* 8.—Whenever any minor shall hold any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order vesting such property in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the minor trustee or mortgagee had attained his majority and

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[1] See *Cardross's Settlement*, 7 Ch. D., 728.

[2] He may be liable for an offence against the criminal law, *post*, chap. vi.

[3] *Stott* v. *Meanock*, 31 L. J., Ch. 746.

[4] Act II of 1882, which extends to the Madras Presidency, the North-Western Provinces, the Punjab, Oudh, the Central Provinces, Coorg and Assam, and may be extended to any other part of British India by a Local Government.

[5] *In re Kahandas Narrandas*, I. L. R., 5 Bom., 154, West, J. held that the Indian Trustee Act applies to a Hindu trust, but there is no similar decision of any other High Court, see Belchambers's Practice 400, note.

[6] Act XXVII of 1866, sec. 3.

[7] Sec. 40.

[8] Act XXVII of 1866, sec. 35. Act XXVIII of 1866, sec. 34.

[9] *In re Shelmerdine*, 33 L. J., Ch. 474.

[10] See Act II of 1882, sec. 6 above.

[11] XXVII of 1866.

[12] Sec. 3, see above note 5.

had duly executed a conveyance of the property in the same manner for the same estate.

Contingent rights of minor trustees and mortgagees.

"*Section* 9.—Where any minor[1] shall be entitled to any contingent right in any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the minor had attained his majority, and had duly executed a deed so releasing or disposing of the contingent right.

Power to appoint a person to convey.

"*Section* 20.—In every case where the High Court shall, under the provisions of this Act, be enabled to make an order having the effect of a conveyance of any immoveable property, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the High Court, should it be deemed more convenient, to make an order appointing a person to convey such property, or release or dispose of such contingent right, and the conveyance or release or disposition of the person so appointed, shall, when in conformity with the terms of the order by which he is appointed, have the same effect, in conveying the property, or releasing or disposing of the contingent right, as an order of the High Court would in the particular case have had under the provisions of this Act.

"In every case where the High Court shall, under the provisions of this Act, be enabled to make an order vesting in any person or persons the right to transfer any stock transferable in the books of any Company or Society established or to be established, it shall also be lawful for the High Court, if it be deemed more convenient, to make an order directing the Secretary or any Officer of such Company or Society at once to transfer or join in transferring the stock to the person or persons to be named in

[1] Sec. 17 contains a similar provision with respect to an unborn person or a class of unborn persons.

the order, and this Act shall be a full and complete indemnity and discharge to all Companies or Societies and their officers and servants for all acts done or permitted to be done pursuant thereto.

Power to make an order for the transfer or receipt of dividends of stock, &c., in name of minor trustee.

"*Section* 30.—When any minor shall be solely entitled to any stock or Government securities upon any trust, it shall be lawful for the High Court to make an order vesting in any person or persons the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof. When any minor shall be entitled jointly with any other person or persons to any stock or Government securities upon any trust, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, either in the person or persons jointly entitled with the minor, or in him or them together with any other person or persons the said Court may appoint.

Money payable to minor in discharge of property conveyed under this Act.

"*Section* 46.—Where any minor * * * shall be entitled to any money payable in discharge of any immoveable property, stock, Government securities, or thing in action conveyed or transferred under this Act, it shall be lawful for the person by whom such money is payable to pay the same into the High Court, in trust in any cause then depending concerning such money, or if there shall be no such cause, to the credit of such minor * * subject to the order or disposition of the said Court; and it shall be lawful for the said Court, upon petition in a summary way, to order any money so paid to be invested in Government securities, and to order payment or distribution thereof, or payment of the dividends or interest thereof, as to the said Court shall seem reasonable."

Applications how to be made.

Applications under the Indian Trustee Act must be by petition supported by affidavits or other evidence.[1]

Costs of applications.

Full powers as to the costs of applications are given to the High Court by that Act.[2]

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[1] Act XXVII of 1866, sec. 40.

[2] *Ibid.*, secs. 42 & 49.

Minor cannot take out letters of administration or probate.

Letters of administration to the estate[1] or probate of the will[2] of a deceased person cannot be granted to a minor.[3] As to the grant of letters of administration to the guardian of a minor see *ante*, p. 35.

Succession certificate.

A certificate under the Succession Certificate Act[4] cannot be granted to a minor.[5]

Certificate of heirship in Bombay.

A minor cannot obtain a certificate of heirship under Bombay Regulation VIII of 1827.[6]

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[1] Act X of 1865, sec. 189. Act V of 1881, sec. 13.

[2] Act X of 1865, sec. 183, Act V of 1881, sec. 8.

[3] *Ante* p. 35, note 2.

[4] Act VII of 1889.

[5] There is no special prohibition in the Act, but the Court could not give to a minor, whose property is the subject of tutelage, a right to collect debts. As to a grant to his guardian, see *ante*, p. 36.

[6] *Baiba* v. *Deguba*, I. L. R., 6 Bom. 728. See *ante* p. 36.

CHAPTER V.

TESTIMONY OF MINORS.

A MINOR, when of sufficient understanding, is competent to give evidence in a Court of Justice.[1] Minor may be a witness.

The Indian Evidence Act[2] provides that "All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

This is in accordance with the English law which regulates the competency of children to give evidence by the degree of understanding which they appear to possess, and not by their age.[3]

When a child is tendered as a witness in a Court of Justice, it is the duty of the Judge, before allowing an Duty of Judge, when child tendered as witness.

[1] "Independently of the sanction of an oath, the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons; what is wanted in the perfection of the intellectual faculties is sometimes more than compensated by the absence of motives to deceive." Phillips on the Law of Evidence, 10th Edn., p. 11.

[2] I of 1872, sec. 118.

[3] Macpherson on Infants, p. 452. Under the Mahomedan law minors were incompetent to give evidence. Macnaghten's Principles of Mahomedan Law, chap. xii, princ. 10. The Hindu law only permitted minors to be witnesses on failure of witnesses duly qualified, or in cases of adultery, theft, affray, and "criminal business." Stokes' Hindu Law books, p. 35. Under Act II of 1855 (sec. 14), which was repealed by Act I of 1872, children under seven years of age, who appeared incapable of receiving just impressions of the facts respecting which they were examined or of relating them truly, were incompetent to testify; but all children over seven years of age were, irrespective of their understanding, competent to testify.

oath or a solemn affirmation to be administered, to examine the child as to his mental capacity and understanding with special reference to his capacity to give a rational account of what he has seen, heard, or done, on a particular occasion. It is also not unusual, but it is not necessary, to examine him as to his knowledge of the penalties attaching to the infraction of an oath or of a solemn affirmation.[1]

Trial by jury.

In cases of trial by jury, the question whether the child's evidence should be admitted, is not one for the jury, but for the Judge alone, although, where the Judge has allowed the child to be sworn or affirmed, and the child has given its testimony, the jury may, and should, in weighing that testimony, take into consideration the youth or incapacity of the witness.[2]

Trial by Judge.

In cases of trial by Judge, whether civil or criminal, the Judge should, in weighing the evidence of children, take into consideration their youth and incapacity.[3]

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[1] *Queen* v. *Hosseinee*, 8 W. R. Crim. R. 60; *Queen-Empress* v. *Lal Sahai*, I. L. R., 11 All., 183. As to the English practice Mr. Phillips in his work on the Law of Evidence (10th Edn., p. 11) says this:—

"It may be observed, the preliminary enquiry usually made for ascertaining their competency, is not always of the most satisfactory nature; and sometimes is of such a description, that merely by a slight practising of the memory, a child might thus be made to appear competent, and qualified as a witness. The enquiry is commonly confined to the ascertaining of the fact, whether the child has a conception of Divine punishment being a consequence of falsehood; it seldom extends so far as to ascertain the child's notions of the nature of an oath, and scarcely ever relates to the legal punishment for perjury. It has been held, however, that the effect of the oath on the conscience of a child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath, which have been communicated with reference to the trial." *R.* v. *Williams*, 7 C. & P., 320.

[2] *Queen* v. *Hosseinee*, 8 W. R. Crim. R. 60.

[3] Mr. Phillips, in his work on the Law of Evidence (10th Edn., p. 11) says:—"With regard to the weight and effect of the testimony of children, Sir W. Blackstone observes that where the evidence of children is admitted, it is much to be wished, in order to render the evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that a conviction should not be grounded on the unsupported accusation of an infant under years of discretion. In many cases undoubtedly, the statements of children are to be received with great caution. But it is clear a prisoner may be legally convicted upon such evidence alone, and unsupport-

Absence of oath or affirmation.

The statement of a child should not be taken unless he be sworn or affirmed,[1] but if the Court has accidentally or intentionally omitted to cause him to be sworn or affirmed, such omission will not invalidate the proceedings or render the deposition useless.[2]

Statements of children.

Statements made by children in cases coming under sec. 32 of the Indian Evidence Act,[3] or in any other cases where statements made by adults are admissible in evidence, would apparently only be admissible after evidence of the intelligence of the child.[4]

When the child is unfit to be sworn, it follows that any account which he may have given to others of the transaction ought not to be admitted ;[4] but where the conduct of a child in reference to any fact in issue in, or relevant to, any suit or proceeding or the conduct of a child, an offence against whom is the subject of any proceeding, is relevant the child's statement accompanying and explaining his acts may be evidence.[5]

In every case where a child's statement is admissible in evidence, great caution must be used in acting upon it as, apart from the want of the safeguard of cross-examination, it may be often difficult to ascertain whether the child has been tutored or whether he is of sufficient intelligence.

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ed ; and whether the account of a child requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the evidence of the child has been given."—(Commentaries, Vol. IV.)

[1] Act X of 1873, sec. 5 ; *Queen-Empress* v. *Lal Sahai*, I. L. R., 11 All., 183 ; *Queen* v. *Anunto Chuckerbutty*, 22 W. R. Crim. R., 1 ; 14 B. L. R., 295 note ; *Queen* v. *Itwarya*, 22 W. R. Crim. R. 14.

[2] Act X of 1873, sec. 13 ; *Queen* v. *Sewa Bhogla*, 14 B. L. R., 294 ; 23 W. R., Crim. R., 12 ; contrâ, *Queen-Empress* v. *Maru*, I. L. R., 10 All., 207.

[3] I of 1872. As to admissions in suits, see *post*, chap. xxv.

[4] See Macpherson on Infants, p. 453. It also follows that statements made by children would be inadmissible unless they fulfil the conditions which render statements made by adults evidence.

[5] As for instance where a female infant has been ravished, and has made a complaint relating to the crime, the circumstances under which and the terms in which the complaint was made would be relevant. (Illustration (*j*) to sec. 8 of Act I of 1872.)

CHAPTER VI.

Wrongs and Criminal Offences by Minors.

Liability of minors for wrongs committed by them.

A minor, like an adult, is liable to be sued for damages in respect of all actionable wrongs, independent of contract, committed by him.[1]

He can also be restrained by injunction, in cases where, if he had been an adult he would have been so restrained.[2]

Responsibility for crime.

The liability of a minor to punishment for offences committed by him against the criminal law varies according to his age.

Minors under seven.

Up to the age of seven years a minor is absolutely free from all responsibility to the criminal law, and nothing done by him while under that age renders him liable to the penalties imposed by that law.[3]

Minors more than seven, and less than twelve.

Between the ages of seven and twelve the responsibility of a minor depends upon the maturity of his judgment. The eighty-third section of the Indian Penal Code[4] is as follows :—

"Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion."[5]

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[1] *Defries* v. *Davis*, 1 Bing. N. C., 692 ; *Bristow* v. *Eastman*, 1 Esp. N. P. C., 172; *Luchmun Dass* v. *Narayan*, 3 N.-W. P. H. C. Rep., 191.

[2] *Chubb* v *Griffith*, 35 Beav., 127.

[3] Act XLV of 1860, sec. 82. This applies as much to offences under other Acts as to those made punishable by the Penal Code.

[4] Act XLV of 1860.

[5] The burden of proving insufficient maturity of understanding is upon the defence, Act I of 1872, sec. 105 ; *Queen* v. *Lukhini Agradini*, 22 W. R. Crim. R. 27. *Contrâ* Morgan and Macpherson's edn. of the Indian Penal Code, p. 60. The English law places the burden upon the prosecution. Archbold's Pleading and Evidence in Criminal Cases, 17th Edn. p. 16. Broom's Legal Maxims, 5th Edn., p. 316.

"The consequences of his conduct" has been held not to mean the penal consequences of his offence, but to mean the natural consequences which flow from his act.[1] The words of the section are however wide enough to include a knowledge that the committal of the act is an offence punished by the criminal law, or rather that the act is wrong.

The manner of committing the offence, or the intelligence shown by the offender in concealing all trace of the crime, will often justify a child being held criminally responsible for an offence.[2] The defence set up by the child and his demeanour at the trial will often also be material.

Abetment of offence by minor.

Although a child may on account of the immaturity of his understanding be free from criminal responsibility, those who abet him in the commission of an offence are liable to conviction,[3] and a receiver may be convicted although the thief be discharged on account of his youth and incapacity.[4]

Receiver.

Minor over twelve years of age.

After he has attained the age of twelve years, a minor is liable to the penalties of the criminal law to the same extent as an adult; but in determining an appropriate punishment, the Court may take into consideration the youth or incapacity of the offender.

Whipping.

Any male juvenile offender who commits any offence which is not by the Indian Penal Code punishable with death may, whether for a first or any other offence, be punished with whipping[5] in lieu of any other punishment to which he may, for such offence, be liable under that Code.[6]

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[1] *Queen* v. *Lukhini Agradini*, 22 W. R. Crim. R. 27.

[2] *Queen* v. *Aimona*, 1 W R. Crim. R. 43; Mayne's Indian Penal Code, 9th Edn., p. 66.

[3] See Act XLV of 1860, sec. 108, Expl 3.

[4] *Queen* v. *Krishna*, I. L. R., 6 Mad., 373.

[5] See Act X of 1882, secs. 392 and 393.

[6] Act VI of 1864, sec. 5. By the term "juvenile offender" is meant an offender under the age of 16 years; *Queen-Empress* v. *Din Ali*, I L. R., 6 All., 482; *Reg.* v. *Muhammad Ali*, 8 Bom. H. C. Rep. Cr. C. 9. *Cf.* Act X of 1882, sec. 392, which is as follows:—

"In the case of a person of or over 16 years of age, whipping shall be inflicted with a light rattan not

Powers of Courts to direct youthful offenders to be sent to Reformatories.

Whenever any youthful offender is sentenced to transportation or imprisonment, and is in the judgment of the Court[1] by which he is sentenced (*a*) under the age of sixteen years, and (*b*) a proper person to be an inmate of a Reformatory School, the Court may direct that, instead of undergoing his sentence, he shall be sent to a Reformatory School, and be there detained for a period which shall be not less than two years and not more than seven years, and which shall be in conformity with rules made by the Governor-General in Council for regulating the periods for which Courts and Magistrates may send youthful offenders to Reformatory Schools according to their ages, the nature of their respective offences, or other considerations.[2]

No boy shall be sent to a Reformatory School, if under ten years of age, for a less period than seven years, if over ten years of age for a less period than five years, unless he shall sooner attain the age of eighteen years.[3]

When any person under the age of sixteen years is sentenced by any Criminal Court to imprisonment for any offence, the Court may direct that such person, instead of being imprisoned in a Criminal Jail, shall be confined in any Reformatory established by the Local Government as a fit place for confinement, in which there are means of suitable discipline, and of training in some branch of useful industry, or is kept by a person willing to obey

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less than half an inch in diameter, in such mode, and on such part of the person, as the Local Government directs, and in the case of a person under 16 years of age it shall be inflicted in the way of school discipline with a light rattan." This does not apply to offences punishable otherwise than under the Indian Penal Code, Act XLV of 1860.

[1] *i.e.*, a High Court, a Court of Session, a Magistrate of the first class, and a Magistrate of Police or Presidency Magistrate in the Towns of Calcutta, Madras, and Bombay. Act V of 1876, sec. 7.

[2] Act V of 1876, secs. 7 and 22.

[3] Rule of Governor-General in Council made under sec. 22 of Act V of 1876. *Gazette of India*, 16th March 1889, p. 151. The Magistrate should ascertain as near as may be the age of the offender, and sentence him to a specified period of detention which should be that elapsing between his conviction and the attainment by him of the age of 18 years. *Queen-Empress v. Narain*, I. L. R., 15 All., 208.

such rules as the Local Government prescribes with regard to the discipline and training of persons confined therein.[1]

Security to keep the peace.

Where a minor is required to give security to keep the peace or to maintain good behaviour, the bond can be executed by his sureties only.[2]

Acts endangering safety of persons travelling by railway.

If a minor under the age of twelve years is with respect to any railway guilty of, (*a*) maliciously wrecking or attempting to wreck a train, (*b*) maliciously hurting or attempting to hurt persons travelling by railway, (*c*) endangering safety of persons travelling by railway by any unlawful act or wilful omission or neglect or by any rash or negligent act or omission, he is to be deemed, notwithstanding anything in sec. 82 or sec. 83 of the Indian Penal Code,[3] to have committed an offence, and the Court convicting him, may, if it thinks fit, direct that the minor, if a male, shall be punished with whipping, or may require the father, or guardian[4] of the minor, to execute within such time as the Court may fix a bond binding himself in such penalty as the Court directs to prevent the minor from being again guilty of any of those acts or omissions.

The amount of the bond, if forfeited, is recoverable by the Court as if it were a fine imposed by itself.

If a father or guardian fails to execute such bond within the time fixed by Court, he shall be punished with a fine which may extend to fifty rupees.[5]

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[1] Act X of 1882, sec. 399.
[2] *Ibid*, sec. 118.
[3] *Ante*, p. 46.
[4] *i e.*, a person having, not unlawfully, the custody of the minor.
[5] Act IX of 1890, sec. 130.

CHAPTER VII.

Wrongs and Crimes against Minors.

Wrongs.

Like an adult, a minor can recover compensation for actionable wrongs from which he has suffered.[1]

Criminal offences.

He is also entitled to the same relief as an adult in the Criminal Courts against persons committing offences with regard to his person or property.[2]

The criminal law contains certain special provisions with respect to the persons of minors.

Intercourse with female under 12.

Sexual intercourse with a female under twelve years of age, whether with or without her consent, and whether by a husband or other person, is punishable as rape.[3]

When the minor is above that age, the husband has no absolute right to enjoy her person without regard to the question of her safety, and may be punished, if, knowing she is not apt for intercourse, he injures her. The nature of the offence, if any, depends upon the circumstances of the case.[4]

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[1] *Modhoosoodun* v. *Kaemoollah Biswas*, 9 W. R. C. R., 327. As to suits by minors, see *post*, chap. xxv. As to the right of a parent to sue for compensation for the death of, or injury to, his child see, *post*, chap. xvi.

[2] See *post*, chap. xxv. As to the prosecution and the compounding of an offence by a guardian, see *post*, chap. xvi.

[3] Act XLV of 1860, sec. 375; as amended by Act X of 1891, sec. 1. No Magistrate except a Chief Presidency Magistrate or District Magistrate, can take cognizance of an offence of rape by a husband, or commit a man for trial for such offence. No Police officer of a rank below that of Police Inspector can be employed to make, or take part in an investigation directed by such Magistrate with respect to such offence, Act X of 1891, sec. 2.

[4] *Empress* v. *Huree Mohun Mythee*, I. L. R., 18 Calc., 49. A Court has no power to require a female to be examined for the purpose of determining whether she is of age or fit for sexual intercourse; *Queen-Em-*

Kidnapping.

Whoever takes or entices any minor, under fourteen years of age if a male, or under sixteen years of age if a female, out of the keeping of the lawful guardian [1] of such minor or of any person lawfully entrusted with the care or custody of such minor,[2] without the consent of such guardian or other person, is said to kidnap such minor,[3] and is punishable therefor,[4] whether he is aware or not that the minor had a guardian.[5] This does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.[6]

Consent of minor immaterial.

Kidnapping is an offence independently of the consent of the minor. To constitute the offence it is not necessary that the kidnapping should have been by force or fraud,[7] or that there should have been any criminal intention.[8]

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press v. *Guru Charan Dusadh*, unreported, Calcutta High Court; but in 1847 a Judge of the Madras Supreme Court ordered an inspection for the purpose of ascertaining the age of a girl; *In re Mooniatta*, Madras Native Herald for 1847, p. 193. Norton's Leading cases, vol. i, p. 114.

[1] *i.e*, a natural guardian (*post*, chap. viii), a testamentary guardian (*post* chap. ix), or a guardian appointed by a Civil Court (*post* chaps. xi and xiv) or by a Court of Wards (*post*, chaps. xxxii, xxxiv and xxxv). A father may be convicted of kidnapping from the husband; *In the matter of Dhuronidhur Ghose*, I. L. R., 17 Calc., 298, or a mother from the father; *In the matter of Prankrishna Surma*, I. L. R., 8 Calc., 969; s. c. *Parameshwari Surma* v. *Empress*, 11 C. L. R., 6.

[2] *i.e.*, having by law the right to the custody, or having such custody with the lawful permission of the person so entitled, see *Queen* v. *Buldeo*, 2 N. W. P. H. C. R., 286. A person, to whom the mother of an illegitimate child entrusted the child on her death-bed, is within this expression.; *Empress* v. *Pemantle*, I. L. R., 8 Calc., 971.

[3] Act XLV of 1860, sec. 361.

[4] Act XLV of 1860, secs. 363 and 369. A higher punishment is given by sec. 369, when the kidnapping is with the intention of taking dishonestly any moveable property from the person of the child.

[5] *Empress* v. *Umsud Baksh*, I. L. R., 3 Bom., 178.

[6] Act XLV of 1860, sec. 361.

[7] *Queen* v. *Amgad Bugeah*, 2 W. R, Crim. R., 61; *Queen* v. *Modhoo Paul*, 3 W. R. Crim. R., 9; *Queen* v. *Koordan Sing*, 3 W. R. Crim. R., 15; *Queen* v. *Gooroodoss Rajbunsee*, 4 W.R. Crim. R., 7.

[8] *In the matter of Dhuronidhur Ghose*, I.L.R., 17 Calc., 298; *In the matter of Prankrishna Surma*, I. L. R., 8 Calc., 969; s.c., *Parameshwari*

Abetment.

The offence of kidnapping may be abetted at any time while the process of taking the minor out of the keeping of his lawful guardian continues.[1]

Selling or buying minor for purposes of prostitution.

The criminal law[2] also punishes persons who sell, let to hire or otherwise dispose of,[3] or who buy, hire or otherwise obtain possession of any minor under the age of sixteen years, with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose,[4] or knowing it to be likely that such minor will be employed or used for any such purpose.

Exposure and abandonment of child.

Whoever being the father or mother of a child under the age of twelve years, or having the care of such child,

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Surma v. *Empress*, 11 C. L. R., 6. The intention is material in case of a charge under sec. 369, I. P. C., *ante* p. 51, note 4.

[1] *Reg.* v. *Samia Kaundan*, I. L. R. 1 Mad., 173.

[2] Act XLV of 1860, secs. 372 and 373.

[3] Disposal need not be tantamount to a transfer of possession or control over the minor's person; *Reg.* v. *Arunachellam*, I. L. R., 1 Mad., 164 *Queen-Empress* v. *Basavas*, I. L. R., 15 Mad., 75. In the latter case the accused dedicated his minor daughter as a Basivi by a form of marriage to an idol. A Basivi is incapable of contracting a lawful marriage, and ordinarily practises promiscuous intercourse. It was held that he was rightly convicted. See also *Exparte Padmavati* 5 Mad. H. C. R., 415; *Reg.* v. *Jaili Bhavin*, 6 Bom. H. C. R., C. C., 60; *Srinivasa* v. *Annasami*, I. L. R., 15 Mad., 323; and *Queen-Empress* v. *Ramanna*, I. L. R., 12 Mad., 273, which was a case of an adoption by a dancing girl for the purpose of prostitution.

[4] See *Queen* v. *Bhutia*, 7 N.-W. P. H. C. R., 295; *Reg.* v. *Ally*, 5 Mad H. C. R., 473 (where it was held that enticing a child away to have illicit intercourse did not come within these provisions:); *Reg.* v. *Jaili Bhavin*, 6 Bom. H. C. R., C. C., 60; *Queen* v. *Nourjan*, 6 B. L. R., App., 34. In *Queen-Empress* v. *Ramanna*, I. L. R., 12 Mad., 273, Muttusami Ayyar, J., said: "It would be no offence if the intention was that the girl should be brought up as a daughter, and that when she attains her age she should be allowed to select either to marry or to follow the profession of her prostitute mother." These observations would have to be considered with reference to the known practices of dancing girls. Knowledge that the child will be brought up as a prostitute at an indefinite, and possibly remote, period, is sufficient to justify a conviction; *Deputy Legal Remembrancer* v. *Karuna*, I. L. R., 22 Calc., 164; *Queen-Empress* v. *Chanda*, I. L. R., 18 All., 24. Disposing of a girl for the purpose of a marriage, which might be objectionable under Hindu Law does not amount to an offence; *Empress* v. *Srilal*, I. L. R., 2 All., 694.

exposes or leaves it in any place,[1] with the intention of wholly abandoning it, is liable to be punished with imprisonment of either description for a term which may extend to seven years, or with fine or with both.[2]

This does not prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child should die in consequence of the exposure.[3]

Neglect to maintain.

A parent or other guardian who, although able to do so, omits to supply a child incapable of taking care of itself with sufficient food may be liable to the criminal law for the death of the child.[4]

Concealment of birth.

Whoever by secretly burying or otherwise disposing of the dead body of a child, whether such child die before or after or during its birth, intentionally conceals the birth of such child, is liable to be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both.[5]

Causing miscarriage.

As to causing miscarriage and injuries to unborn children, see Act XLV of 1860, secs. 312 to 316.

Registered eunuch keeping boy under 16.

A registered eunuch who has in his charge, or keeps in the house in which he resides, or under his control, any boy who has not completed the age of sixteen years shall be punished with imprisonment for a term which may extend to two years, or with fine or with both.[6]

Maintenance and education of boys found in such keeping.

The Magistrate may direct that any such boy shall be returned to his parents or guardians, if they can be discovered. If they cannot be discovered, the Magistrate may make such arrangements as he thinks necessary for the maintenance and education of such boy, and may

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[1] See *Queen-Empress* v. *Mirchia*, I. L. R., 18 All., 364, where it was held by the majority of the Court that a mother leaving her child with a blind woman with the intention of not returning did not commit an offence under this section.

[2] Act XLV of 1860, sec. 317.

[3] *Ibid*, sec. 317. It has been held that if the circumstances shew a case of culpable homicide, the mother cannot be convicted under this section.—*Empress* v. *Banni*, I. L. R., 2 All., 349.

[4] *Queen* v. *Ganga Sing*, 5 N.-W. P. H. C. Rep., 44. As to the maintenance of minors, see *post*, chap. xxii.

[5] Act XLV of 1860, sec. 318.

[6] Act XXVII of 1871, sec. 27, extended to Bengal by Act VII of 1876.

direct that the whole or any part of the fine be employed in defraying the cost of such arrangements.[1]

Indian Factories Acts.

As to offences under the Indian Factories Acts see *ante*, pp. 25 and 26.

Apprentices.

As to complaints by apprentices against their masters, *see* Act XIX of 1850, secs. 13 and 14, *post*, Chapter XVI.

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[1] Act XXVII of 1871, sec. 28. The Local Government may direct out of what local or municipal fund so much of the cost of such arrangements as is not met by the fine shall be defrayed.

CHAPTER VIII.

NATURAL RIGHT OF GUARDIANSHIP.

THE incapacity of minors necessarily requires that the law should provide for the care of their persons and property by adult persons willing and able to look after the interests of minors committed to their charge. The persons having the care of the persons and the custody of the estates of minors are termed their *guardians*.[1] Guardians.

A minor is incompetent to act as guardian of any minor except his own wife or child, or, where he is the managing member of an undivided Hindu family, the wife or child of another member of the family.[2] Who cannot be guardians.

Idiots, insane persons, and registered eunuchs[3] are also incompetent to act as guardians of minors.

Guardians are either— Kinds of guardians.

(1) Natural guardians;

(2) Testamentary guardians;[4]

(3) Guardians appointed by a Civil Court or by a Court of Wards.[5]

Although the rights of natural and testamentary guardians cease on the appointment of a guardian by a Civil Court[6] or by a Court of Wards,[7] the Courts in the Recognition of natural guardians.

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[1] Act VIII of 1890, sec. 4 (2). As to the termination of guardianship, see Act VIII of 1890, sec. 41, *post*, chaps. xvi and xviii. *Reade* v. *Krishna*, I. L. R., 9 Mad., 391.

[2] Act VIII of 1890, sec. 21.

[3] Act XXVII of 1871, sec. 29, extended to Lower Bengal by Act VII of 1876.

[4] *Post*, chap. ix.

[5] As to the appointment of guardians by District Courts, see *post*, chap. xi; as to the appointment by High Courts, see *post*, chap. xiv; and as to the appointment by Courts of Wards, see *post*, chaps. xxxii, xxxiv, and xxv.

[6] Act VIII of 1890, sec. 7 (2), *post*, chap. xi.

[7] *Ibid*, sec. 41, *post*, chaps. xvi and xviii, and see *post*, chap. xxx.

absence of such appointment recognise their rights and in making an appointment take those rights into consideration.[1]

Hindu law.

By the Hindu law, the ruling power is in every instance, whether the natural guardian be living or dead, recognized to be the supreme guardian of the property of all minors, whether male or female.[2] The ruling power is now represented by the Courts of law.[3]

The Hindu law does not seem to prescribe any positive rules with respect to the right of guardianship ; but by practice and custom the rights of certain relations of a Hindu minor have now almost acquired the force of law. For instance, the rights of the father, and of the mother after the death of the father, have been so long and universally acknowledged as to be now indisputable.

Right of father.

A Hindu father, in preference to the mother,[4] is recognized as the legal guardian of all his male, and of his female unmarried, minor children.[5] The adoptive father acquires the same right, even as against the natural father.[6]

Right of mother.

After the father, and in the absence of a valid appointment by him,[7] the mother is entitled to the guardianship of her minor children.[8] It has been held that under the

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[1] See Act VIII of 1890, sec. 17 (1), *post*, chap. xi. Although in these matters the Courts are not compelled to administer the Hindu and Mahomedan laws, they will look to such laws in order that they may proceed according to justice, equity, and good conscience. See Act XII of 1887, sec. 37 (2), Act III of 1873, sec. 16, Bom. Reg. IV of 1827.

[2] Macnaghten's Hindu Law, vol. i, chap. VII, Edn. 1829, p. 104; Colebrooke's Digest, Edn. 1801, p. 542, vol. iii, chap. viii, secs. 449, 450, Menu, chap. viii, verse 27.

[3] *Ram Bunsee Koonwaree* v. *Soobh Koonwaree*, 7 W. R. C. R., 325 ; 2 Ind. Jur. N. S., 193.

[4] *In the matter of Prankrishna Surma*, I. L. R., 8 Calc., 969 ; s. c. *Parameshwari Surma* v. *Empress*, 11 C. L. R. 6. See *Modhoo Soodun Mookerjee* v. *Jadub Chunder Banerjee*, 3 W. R. C. R., 194.

[5] Macnaghten's Hindu Law, vol. i, Edn. 1829, chap. vii, p. 103. *In matter of Himnauth Bose*, 1 Hyde, 111 ; see Act VIII of 1890, sec. 19, *post* chap. xi.

[6] *Laksmibhai* v. *Vasudev Takle*, I. L. R., 3 Bom. 1.

[7] See *post*, chap. ix.

[8] See *Kooldeep Narain* v. *Rajbunsee Kowur*, 7 Sel. Rep., 395 ; 2nd Edn., p. 467 ; Macnaghten's Hindu

Mithila law, she is entitled to the guardianship even during the life of the father.[1]

If the minor is a member of a joint Hindu family, the *kurta* of the family would be entitled to the management of the joint property ; but if the family is a divided one, the mother is entitled to the custody of the minor's property.[2] Where the mother is manager of her minor child's property, she should act under the advice of her husband's relations.[3]

Right of other relations.

It has been held by the Bengal High Court[4] that, in the absence of a father and mother, no relation has under Hindu law an absolute right to the guardianship or custody of a minor.

The Hindu law prescribed a succession to the right of guardianship after the father and mother.[5] This succession may, however, only have been intended to guide the Court in the choice of a guardian.[6]

Step-mother.

Where the mother is dead the stepmother of the minor is not entitled to be guardian, at any rate in preference to the paternal relations.

Difference of opinion.

In 1821 it was held by the Bombay Sudder Court in the case of *Lukmee* v. *Umur Chund Deo Chund*[7], that the stepmother, in preference to the paternal uncle, was the legal guardian of a minor ; and there is a similar decision by a single Judge of the Sudder Court of the North-

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Law, Edn. 1829, vol. i, chap. vii, p. 103 ; and vol. ii, chap. vii, case iv, p. 205.

[1] *Jussoda* v. *Nettya Lall*, I. L. R. 5 Calc., 43 ; see *Soobah Doorga Lal Jha* v. *Neelanund Singh*, 7 W. R. C. R., 74.

[2] Sir E. H. East's Notes, Morley's Digest, vol. II, p. 50. West and Bühler, 2nd Edn., p. 88. In *Motee Singh* v. *Dooluth Singh*, N.-W. P. S. D. A., 13th April 1844, it was held that an elder brother, if not separated, could act as guardian.

[3] Macnaghten's Hindu Law, Edn. 1829, vol. i, chap. vii, p. 103 ; and see Sir E. H. East's Notes, Morley's Digest, vol. II, p. 50.

[4] *Kristokissor Neoghy* v. *Kadermoyee*, 2 C. L. R., 583. The Legislature has to some extent adopted this view, see Act VIII of 1890, sec. 19, *post*, chap. xi.

[5] Macnaghten's Hindu Law, Edn. 1829, vol. i, chap. vii, pp. 103 and 104.

[6] See *Kristokissor Neoghy* v. *Kadermoyee*, 2 C. L. R., 583.

[7] 2 Bom. Sud. Ct. Rep. 144.

Western Provinces;[1] but a Division Bench of the Bengal High Court held[2] that the paternal grandmother has a right to the guardianship of a Hindu minor in preference to the stepmother.

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[1] *Nunkoolal* v. *Shoodra*, Decisions for 1847, p. 115.

[2] *Ram Bunsee Koonwaree* v. *Soobh Koonwaree*, 7 W. R. C. R., 321; 2 In. Jur. N. S. 193. The only authority for the decision of the Bombay Court seems to be the statement in the Institutes of Menu: chap. ix, verse 183. "Thus, if among all the wives of the same husband one bring forth a male child, Menu has declared them all, by means of that son, to be mothers of male issue." As to this Macpherson, J., in delivering the judgment of the Bengal High Court says: "This verse, however, does not, in our opinion, justify the conclusion arrived at by the shastrees and the Court (*i.e.*, the Bombay Sudder Court). It may be that the existence of a son by one wife may, according to Hindu law, put all the wives of the son's father in the position of mothers in a religious point of view, and as regards their future state; but it by no means necessarily follows that all the wives are, therefore, in the same position towards the child as its actual mother. Menu does not say that the stepmother is to stand in all things in the same position towards the son as his mother, and if it be clear and settled law that she does *not* do so in some respects, we fail to see anything in the verse referred to which leads directly or indirectly to the inference that she stands in that position as regards guardianship. That she does not stand as a mother for all purposes is unquestionable. For under no circumstances can she inherit from her stepson—See *Jotee Lall* v. *Doranee Koer*, W. R., F. B. R., 173. If the text of Menu does not make the stepmother a mother so that she may inherit, we cannot see what there is in the text which makes her a mother so as to make her the legal guardian." And in the same judgment Macpherson, J., further says: "It appears to us that the paternal grandmother is a relative of the minor's more fitting as a rule to be selected as guardian than is the stepmother, because we are of opinion that her appointment as guardian is the more likely to be for the minor's interests, and is the appointment most in accordance with the general principles of Hindu law. When we find that under no circumstances can a stepmother inherit from her stepson (*Jotee Lal* v. *Doranee Koer*, W. R. F. B. R., 173), and that on partition the stepmother does not get a share, because she is not included in the term 'mother;' (Dayabhaga, chap. iii, sec. 2, cls. 29, 30), and when we find that the grandmother can inherit from her grandson (a point as to which there can be no dispute, and on which it is, therefore unnecessary to refer to authorities), we cannot but come to the conclusion that, according to Hindu law, the connection between the paternal grandmother and her grandchild is to be deemed closer than the connection between the child and its stepmother. Blood relationship, especially on the father's side, is usually preferred by Hindu law. In the case of the paternal grandmother, we have that relationship; in the case of the stepmother, we have it not."

On the death of the mother, or in the event of her having become a recluse or becoming otherwise disqualified from acting as the guardian of her children,[1] the elder brother,[2] or in default of him the elder half-brother[3] is preferred for the guardianship both of the person and property of a minor, although their right may not be so absolute as that of a father or a mother.[4] Right of elder brother. Elder half-brother.

After these, the paternal relations generally are preferred; and failing such relatives, the office devolves on the maternal kinsmen according to their degree of proximity.[5] Paternal relations. Maternal relations.

A Hindu father has not, as against the mother, any right to the guardianship of his illegitimate offspring.[6] The mother would ordinarily be entitled to the custody of her illegitimate offspring.[7] Illegitimate child.

After marriage the right of guardianship of the person and property of a female minor devolves upon her husband,[8] if not unfit,[9] even though he be himself a minor.[10] The husband has the right to demand that his wife shall reside in the same house as himself, unless he be bound by a special custom to the contrary or there be special circumstances such as absolve the wife from that duty and her parents or guardians from the duty of surrendering her to her husband.[11] The minority of the wife does not of itself constitute such a ground, and this right of the husband is independent of the question Guardianship, of minor wife.

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[1] *Muhtaboo* v. *Gunesh*, 10 Ben. S. D. A., 329. *In the matter of Ishwar Chunder Surma*, 6 Ben. S. D. A., 471.

[2] Macnaghten's Hindu Law, Edn. 1829, vol. I, chap. vii, p. 103. *In the matter of Ishwar Chunder Surma*, 6 Ben. S. D. A., 471.

[3] *Muhtaboo* v. *Gunesh*, 10 Ben. S. D. A., 329. On coming of age the whole brother is entitled to supersede the half brother. *Dabee Singh* v. *Bujroo Singh*, 5 N.-W. P. S. D. A. 336.

[4] See *ante*, p. 57.

[5] Macnaghten's Hindu Law, Edn. 1829, vol. I, chap. vii, p. 104.

[6] *King* v. *Nagapen*, 2 Madras Notes of cases 91. *In the matter of Saithri*, I. L. R., 16 Bom., 317.

[7] *Venkamma* v. *Savitramma*, I. L. R., 12 Mad., 67.

[8] Macnaghten's Hindu Law, Edn. 1829, vol. I, chap. vii, p. 104; Colebrooke's Digest, Bk. iv, chap. i, cls. 4, 5, and 12. *In the matter of Dhuronidhur Ghose*, I. L. R., 17 Calc., 298.

[9] Act VIII of 1890, s. 41 (*d*.)

[10] *Ibid*, s. 21.

[11] *Suntosh Ram Doss* v. *Gera Puttuck*, 23 W. R. C. R., 22; *Boolchand Kollta* v. *Janokee*, 25 W. R. C. R., 386.

whether she is physically fit to perform the duties of a wife.[1] In giving up a very young girl to her husband a Court might require him to show that she would be placed by him under the care of some female member of his family.[2]

After death of husband.

After the husband's death the guardianship of his minor widow, and the management of her property, devolve upon the husband's heirs generally, or upon those who are entitled to inherit his estate after her death,[3] in preference even to her own father.[4]

On failure of her husband's heirs the widow's paternal relations are her guardians, and failing them her maternal kindred.[5]

Malabar and Canara.

In the case of a person domiciled in the Presidency of Madras following the Marumakkatyam or the Aliyasantana law of inheritance, when a man's wife and children are minors maintained by him or his *tarwad*, he is, subject to the provisions of the Guardians and Wards Act, 1890,[6] the guardian of his wife when she is over fourteen years of age and of his children, provided that such guardianship shall not extend to the right and interest of his wife or children in the property of the *tarwad* to which his wife and children belong.[7]

The *karnavan* of the *tarwad*, i.e., the head of the community, is the guardian of a minor's share of the common property, and would also apparently be guardian of the person in a case where the father is dead or disqualified.[8]

Mahomedan law.

The natural guardians of minors are, according to the Mahomedan law, either *near* or *remote*. Fathers, their

[1] *Kateeram Dokanee* v. *Gendhenee*, 23 W. R. C. R., 178.

[2] *Ibid.*

[3] Macnaghten's Hindu Law, Edn. 1829, vol. i, chap. vii, p. 104, and vol. ii, chap. vii, cases 1 and 3. *Khetter Monee* v. *Kishen Mohun Mitter*, 2 Hay, 196; Marshall 313; *Khudiram Mookerjee* v. *Bonvarilall Roy*, I. L. R., 16 Calc., 584; *Baikesar* v. *Bai Ganga*, 8 Bom. H. C. R., A. C. J., 31; see West and Bühler, 2nd Edn., pp. 129, 134, 245, and 556.

[4] Macnaghten's Hindu Law, Edn. 1829, vol. ii, chap. vii, case 3, p. 204.

[5] Macnaghten's Hindu Law, Edn. 1829, vol. i, chap. vii, p. 104.

[6] *Post*, chap. xi.

[7] Act IV (M. C.) of 1896, sec. 18.

[8] *Thathu Baputty* v. *Chakayath Chathu*, 7 Mad. H. C. R., 179.

executors, paternal grandfathers, their executors, and the executors of such executors, constitute the *near guardians*. All other guardians are *remote guardians*.[1]

Guardianship of property.

Near guardians alone are entitled to the management of the property of a Mahomedan minor.[2]

Failing them the custody and care of the minor's property does not devolve upon the *remote guardians*, but it devolves upon the ruling authority,[3] or its representative the judge, whose duty it is to appoint a guardian.[4] *Remote guardians* are under no circumstances entitled to the management, and they cannot bind a minor by any act relating to his property.[5]

Guardianship of person.

Sunnis.

According to the Sunnis, the mother is entitled to the custody of her children during the period of *hizanut*, i.e., she is entitled to the custody of her male child until he attains the age of seven years,[6] and of her female child, even as against the husband[7] of the child, until puberty.[8]

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[1] Macnaghten's Mahomedan Law, Principles, chap. viii, 4th Edn., p. 62. In Amir Ali's Mahomedan Law, vol. ii, p. 473, it is said that among the Shiahs, the grandfather is preferred to the father's executor.

[2] *Bhutnath Dey* v. *Ahmed Hosain*, I. L. R., 11 Calc., 417; *Sitaram* v. *Amir*, I. L. R., 8 All., 324, at p. 338; Tagore Law Lectures, 1873, p. 477; Macnaghten's Mahomedan Law, Principles, 5th Edn., p. 304. As to their powers, see *post*, chap. xvii.

[3] *Bukshan* v. *Maldai*, 3 B. L. R., 423; s.c. *Bukshun* v. *Doolhin*, 12 W. R. C. R., 337; *Rutton* v. *Dhoomee Khan*, 4 N.-W. P. H. C. R., 21. Macnaghten's Principles of Mahomedan Law, chap. viii, para. 6. Baillie's Digest, Part I, p. 319.

[4] See Tagore Law Lectures for 1873, p. 478; Macnaghten's Mahomedan Law, Precedents, chap. vii, case i.

[5] *Bukshan* v. *Maldai*, 3 B. L. R., 423; s.c. *Bukshun* v. *Doolhin*, 12 W. R., C.R., 337; *Bhutnath Dey* v. *Ahmed Hosain*, I. L. R., 11 Calc., 417; *Baba* v. *Shivappa*, I. L. R., 20 Bom., 199; *Sita Ram* v. *Amir*, I. L. R., 8 All., 324, at p. 338. There is nothing to prevent a remote guardian from bringing a suit as next friend of his ward; *Abdul Bari* v. *Rash Behary Pal*, 6 C. L. R., 413.

[6] *Ameeroonissa*, 11 W. R. C. R., 297; *In the matter of Tayheb*, 2 Hyde, 63; *Alimodeed Moallem* v. *Syfoora*, 6 W. R. M. R. 125; *Futteh Ali Shah* v. *Mahomed Mukeem Ooddeen*, W. R. 1864, C. R., 131. See Hedaya, vol. i, Bk. IV, chap. xiv. As to the loss of the mother's right, see *post*, chap. x.

[7] *Nurkadir* v. *Zuleikha*, I. L. R., 11 Calc., 649. *In the matter of Khatija*, 3 B. L. R., 557; *In re Mahin*, 13 B. L. R., 160.

[8] Macnaghten's Mahomedan Law, Principles, chap. viii, princ. 8; Precedents, chap. vi, case 18, *Hamid Ali* v. *Imtiazan*, I. L. R., 2 All., 71; *In the matter of Khatija*, 5 B. L. R.,

Right not lost by separation.

The mother, if of good character, retains her right after separation from her husband,[1] even although she may have been divorced from him.[2]

Grandmother.

Failing the mother, the mother's mother how high soever (that is to say, the maternal grandmother,[3] great grandmother, and so forth), and failing her, the father's mother how high soever,[4] is entitled to the custody.

Sisters.

Failing the mother and grandmothers, the right of custody of the minor devolves upon the sisters,—namely, first on the full sister, then on the uterine half sister, and

Daughters of sisters.

then on the half sister by the father's side. Then follow the daughters of the sisters in the order in which their mothers were entitled. According to one tradition the maternal aunt is preferable to a half sister by the father's side ; but this tradition has not apparently been supported by practice.

Aunts.

After the sisters and their daughters come the maternal aunts, and failing them the paternal aunts.[5] The same distinction also prevails among the aunts as among the sisters,—that is, she who is doubly related has a preference to her who is singly related ; thus the maternal aunt, who is full sister to the mother, precedes a half sister of the mother, maternal or paternal ; and in the same manner, a maternal sister of the mother precedes a paternal sister ; and so also of the paternal aunts.[6]

Period of custody.

All these persons are entitled to the custody of the minor for the same period as the mother is so entitled.[7]

Effect of Indian Majority Act on rights of female relations.

As according to Mahomedan law, the right of the mother and other female relations to the custody of a girl,

557 ; *Abdul* v. *Usmankhan*, Bom. P. J.,1881, 335; *Beedhun* v. *Fazuloollah*, 20 W. R. C. R., 411 ; *Mohomuddy* v. *Oomdutoonissa*, 13 W. R. C. R., 454.

[1] Tagore Lectures for 1873, p. 485. Hedaya, vol. i, book iv, chap. xiv.

[2] *Hamid Ali* v. *Imtiazan*, I. L. R., 2 All., 71. Macnaghten's Mahomedan Law, Appendix, Title "infant 8. Edn. 1870, p. 446.

[3] *Bhoocha* v. *Elahi Bux*, I. L. R., 11 Calc., 574.

[4] See note at p. 486 of Tagore Law Lectures, 1873. Hedaya, vol. i, Bk. iv, chap. xiv ; and Baillie's Digest, Part I, pp. 431, 432.

[5] Tagore Law Lectures, 1873, p. 486. Baillie's Digest, Part I, pp. 431 and 432.

[6] Hedaya, vol. 1, Bk. iv, chap.xiv.

[7] *Ante*, p. 61.

continues until what is majority according to that law, namely, puberty,[1] there may be a question whether the Indian Majority Act[2] has not extended the rights of the mother,[3] but having regard to the reason for the change of custody at that period, namely, the necessity for the supervision of the conduct of a girl, who has arrived at maturity,[4] it would probably be held that the custody would be with the male relations between puberty and majority.

Custody after period of *hizanut* or in default of female relations.

After the termination of the period of *hizanut*, or during that period, if there be no female relation of the minor capable of being entrusted with the custody, the right of custody devolves upon the agnate male relations[5] for the purpose of education and marriage, and continues until the attainment of majority. This right is determined in proportion to the proximity of the claims of the relatives to inherit the estate of the minor.

Custody of boy.

Of these relations the father is the first entitled, then the paternal grandfather and the paternal great grandfather, and so forth ;[6] then the full brother, then the half brother by the father, then the son of the full brother, then the son of the half brother by the father, then the full paternal uncle, then the half paternal uncle on the father's side, and then the sons of paternal uncles in the same order.[7] A girl, however, according to Mahomedan law, ought not to be entrusted to the care of any male person unless he be within the prohibited degrees of relationship, which include all the male persons enumerated above as entitled to the custody of a boy, with the exception

Custody of girl.

[1] *Ante*, p. 2.

[2] Act IX of 1875, sec. 3 *ante*, p. 8.

[3] See *Reade* v. *Krishna*, I. L. R., 9 Mad., 391.

[4] See Hedaya, vol. I, Bk. iv, chap. xiv.

[5] Tagore Lectures, 1873, p. 488. Macnaghten's Mahomedan Law, Principles, chap. viii, princ. 10. Baillie's Digest, Part I, p. 434. See *Fuseehun* v. *Kajo*, I. L. R., 10 Calc., 15; *Bhoocha* v. *Elahi Bux*, I. L. R., 11 Calc., 574; *Rutton* v. *Dhoomee Khan*, 4 N.-W. P. H. C. R., 21.

[6] Hedaya, vol. i, Bk. iv, chap. xiv, p. 389. *Ida* v. *Amiran*, I. L. R. 8 All., 322. As to the rights of the father, see Act VIII of 1890, sec. 19, *post*, chap. xi.

[7] Tagore Lectures, 1873, p. 488.

of the sons of the paternal uncles, to whom the custody of females may not be entrusted.[1]

Shiahs.

According to the Shiahs, the mother is entitled to the custody of her male child until he is two years old,[2] and of her female child, until she is seven years old.[3]

The father then becomes entitled, but failing him the mother's right returns. When both parents are dead, the father's father becomes entitled to the custody, and after him apparently the male relations become entitled in the same order as they are entitled to inheritance.[4]

Illegitimate children.

The Mahomedan law does not recognise the right of a putative father to the guardianship of the person or property of his illegitimate child.[5]

The right of a mother to the custody of her illegitimate children is co-extensive with, if not greater than, her right to the custody of her legitimate children,[6] and inasmuch as the father and his relations are not recognised, she would probably be held entitled to the guardianship of their persons, if not also of their property, until they arrive at majority.

Failing the mother, it would appear that no relation is entitled as a matter of right to the guardianship of either the persons or the property of Mahomedan minors of illegitimate birth. It would be for the Court to determine what custody would be for the interest of the minor.

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[1] Tagore Lectures, 1873, p. 488, Baillie's Digest, Part I, 433.

[2] Baillie's Digest, Part II, p. 95.

[3] *In re Hosseini*, I. L. R., 7 Calc., 434; *Lardli* v. *Mahomed Amir Khan*, I. L. R., 14 Calc., 615; *Raj* v. *Reza Hossein*, 2 W. R. C. R., 76; see *Mohummuddy* v. *Oomdutoonissa*, 13 W. R. C. R., 454; and *Fuseehun* v. *Kajo*, I. L. R., 10 Calc., 15 As to the loss of the mother's right, see *post*, chap. x.

[4] Baillie's Digest, Part II, p. 95.

[5] *Shahjehan* v. *Munro*, 5 S. D. A. N.-W. P., 39; 1 Sel. Reps. S. D. A. N.-W. P., 16. The father would be entitled in the case where he has acknowledged the paternity under circumstances which legitimate the child according to Mahomedan law.

[6] Baillie's Digest, Part I, p. 433, note; *Shahjehan* v. *Munro*, 5. S. D. A. N.-W. P., 39; 1 Sel. Reps. S. D. A. N.-W. P., 16. This applies to the illegitimate offspring of a Mahomedan mother and a European father; *Shahjehan* v. *Munro*, above.

Under the Mahomedan law, a husband has not such an absolute right to the custody of his minor wife as is accorded to Hindu husbands by the Hindu law. Right of husband.

Even after the marriage, the mother, or other guardian, is entitled to retain the infant wife until she has attained puberty and is fit to bear the embraces of a husband.[1] After that period has arrived he is entitled to have her made over to him, provided that he has paid the dower due to her.[2] Even before she has attained puberty the law does not consider the custody of a wife by her husband as an unlawful custody,[3] at any rate where the marriage is an irrevocable one.[4] On the other hand, the husband is not obliged to maintain his wife when she is too young for matrimonial intercourse ;[5] and his right to the custody of his wife is, in every case, dependent upon her being maintained by him.

Before the passing of the Guardians and Wards Act,[6] rights of guardianship of all persons to whom the Hindu and Mahomedan laws were inapplicable, were determined in the main by the English law,[7] and except so far as that Act applies they must be still so determined. Persons other than Hindus and Mahomedans.

[1] *Nurkadir* v. *Zuleika*, I. L. R., 11 Calc., 649. *In the matter of Khatija* 5 B. L. R., 557. *In the matter of Mahin*, 13 B. L. R., 160. Macnaghten's Mahomedan Law. Precedents, chap. vi, case 16, p. 265 ; *Wazeer Ali* v. *Kaim Ali*, 5 N.-W. P. H. C. R., 196.

[2] Baillie's Digest, Part I, pp. 54, 125 and 126.

[3] *In the matter of Mahin*, 13 B. L. R., 160. There is a question whether Act VIII of 1890, sec. 19 (*post*, chap. xi) has not by implication given to a Mahomedan husband a right to the custody of his minor wife even though she may not have attained puberty. The Court would, however, having regard to Mahomedan law, probably treat a husband as unfit to be guardian of the person of his immature wife.

[4] See *post*, chap. xxiii.

[5] Baillie's Digest, Part I, p. 437; Hedaya, vol. I, Bk. iv, chap. xv. See *Kolashun* v. *Didar Buksh*, 24 W. R. C. R., 44.

[6] Act VIII of 1890.

[7] The High Courts in their original jurisdiction administer the common law and statute law of England which existed at the date of the establishment of the Supreme Courts and is applicable to India, as modified by the statutes relating to India, and the Acts of the Indian Legislatures (See Morley's Digest, Introduction, p. 22). The Civil Courts in the districts, in cases for which there is no statutory law, or law having the force of statutes, applicable, except in questions regarding succession, inheritance, marriage or caste, must proceed according to justice,

Sec. 17 of the Guardians and Wards Act[1] provides that—

European British subjects, guardianship of person.

"As between parents who are European British subjects[2] adversely claiming the guardianship of the person, neither parent is entitled to it as of right, but, other things being equal, if the minor is a male of tender years[3] or a female, the minor should be given to the mother, and if the minor is a male of an age to require education and preparation for labour and business, then to the father."

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equity, and good conscience (see Act XII of 1887, sec. 37; Act III of 1873, sec. 16; Bom. Reg. IV of 1827), *i.e.*, they must administer such principles of English law, and equity as are applicable to a similar state of circumstances. See *In the matter of Saithri*, I. L. R., 16 Bom., 323, and *Varden Seth Sam*, v. *Luckpathy Royjee* 9 Moo., I. A., 303; *Waghela Rajsanji* v. *Masludin*, I. L. R., 11 Bom., 561; L. R., 14 I. A., 89. As to Parsees see *The Queen* v. *Bezonji*, Perry's Oriental cases, 97.

[1] VIII of 1890.

[2] By sec. 4 of the Act "European British subject" means an European British subject as defined by the Code of Criminal Procedure 1882, and includes any Christian of European descent. "European British subject" as defined by sec. 4 of the Code of Criminal Procedure (Act X of 1882) is as follows:—

(1) "Any subject of Her Majesty born, naturalised or domiciled in the United Kingdom of Great Britain and Ireland, or in any of the European, American, or Australian Colonies or Possessions of Her Majesty, or in the Colony of New Zealand, or in the Colony of the Cape of Good Hope or Natal:

(2) Any child or grandchild of any such person by legitimate descent."

As far as I am aware, the words "any Christian of European descent," have not yet received a judicial interpretation, but they would probably be taken to include all Christians who could trace their descent, however far back, from a European, see *Rollo* v. *Smith*, 1, B. L. R., O. C., 10; *Bysenath Singh* v. *Reed*, 2 Morley's Digest, 36; *Rollo* v. *Smith* was doubted but not actually dissented from by the referring Bench in *Rainey* v. *Nobocoomar Mookerjee*, 5 C. L. R., 543.

[3] "Tender years" must be construed with reference to the subsequent provision as to when a boy should be made over to his father. It is not possible to fix any definite age at which a boy requires education, and preparation for labour and business, but it might not be unreasonable to consider that this age would generally be arrived at about the completion of the seventh year. The custody of Infants Act (2 & 3 Vict., c. 54) permitted the Court of Chancery to give the mother the custody of her infant children under seven years of age. See also *In re Taylor*, 4 Ch.D., 157. Seven is the age fixed by the Indian Legislature, as ordinarily the age when a child's maturity of understanding would prevent him committing crimes (Act XLV of 1860, sec. 83, *ante* p. 46), and seven years is the age of nurture according to English law; see *Ex parte Knee*, 1 B. & P. N. R., 148; *Empress* v. *Pemantle*, I. L. R., 8 Calc., 971.

That section only applies to cases where the Court is appointing a guardian.

Right of surviving parent.

The father would, in case of the death or incapacity of the mother, be preferred as guardian of his male children of tender years, and of his female minor children. Similarly in case of the death or incapacity of the father, the mother would be preferred as guardian of older male children.[1]

Right of father.

Apart from any question as to who is to be preferred in the appointment of a guardian of a European British subject, the legal power over minors, other than Hindus and Mahomedans, belongs to the father, and only after his death does the mother acquire any rights.[2]

The Legislature of this country has not given to the mother rights similar to those now possessed by mothers in England,[3] but where it is desirable that the children should be placed under the guardianship of the mother, the best course is to take proceedings for the appointment of a guardian.[4]

Where the summary powers of the Court are invoked,[5] the Court will not support the rights of the father against the interests of the child.

Guardianship of property.

Although under English law, the father has not a right to the complete control of the property of his minor children, the Courts in this country would treat the father as being the person most likely to guard the interests of his children and would maintain his custody of their property,[6] but

Father.

[1] See *Villareal* v. *Mellish*, 2 Swanst., 536; s.c. *Mellish* and *DeCosta*, 2 Atk., 14; *Roach* v. *Garvan*, 1 Ves. Sen., 158.

[2] *In the matter of Holmes*, 1 Hyde, 99. The father is entitled to this right absolutely even against the mother, and the father is not obliged to permit the mother to have access to the children (see *Ball* v. *Ball*, 2 Sm., 35); but, where he has agreed to give such access to the mother, he will be compelled to allow and make proper provision for such access (*ex parte Lytton*, quoted at 5 East, 222), and where the father is seeking relief from the Court he may be put upon terms to allow his wife from time to time to see her children (*In the matter of Holmes*, 1 Hyde, 99).

[3] See 2 and 3 Vict., c. 54; 36 and 37 Vict., c. 12; 49 and 50 Vict., c. 27.

[4] *Post*, chaps. xi and xiv.

[5] *Post*, chap. xx.

[6] "If an estate be left to an infant, the father is by common law the guardian, and must account to his

his powers to deal with it are not equal to those possessed by Hindus and Mahomedans.[1]

Mother.

Failing the father, the mother's custody of her children's property would be recognised as not unlawful.

Rights of other relations.

Failing the father and mother, and their appointees,[2] no person, however, nearly related, is of right entitled to the custody of minors, who are neither Hindus nor Mahomedans, or to the guardianship of their property.

The Court would not, however, unless the interests of minor demanded it, summarily interfere with a possession not improperly obtained,[3] and in the appointment of a guardian will look amongst other things to nearness of kin.[4]

Husband.

A husband is the natural guardian of his minor wife[5] according to the English law, which would be administered in the case of those who are not Hindus or Mahomedans.

Illegitimate children.

The portion[6] of sec. 17 of the Guardians and Wards Act, which deals with contests between parents, who are European British subjects, does not apply to the case of illegitimate children.[7]

Neither the father nor the mother has any absolute legal right to the custody of their illegitimate child.[8] The Court would, however, in the interests of the child ordinarily prefer the mother,[9] at any rate during the

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child for the profit." Kerr's Blackstone, vol. I, p. 487. As to the payment of a legacy given to a minor, see *ante*, p. 32.

[1] See *post*, chap. xvii; Simpson on Law of Infants, 2nd Edn., p. 180.

[2] As to the power of appointment of guardians, see *post*, chap. ix.

[3] See *post*, chap. xx.

[4] Act VIII of 1890, sec. 17 (2), *post*, chap. xi.

[5] See Act VIII of 1890, sec. 19.

[6] Sec. 17 (4) *ante*, p. 66.

[7] The word "parents" would, unless there be anything in the context to the contrary, which there is not in this section, apply only to children born in wedlock. The English law regards an illegitimate child as nobody's child (see Macpherson on Infants, p. 67.)

[8] Macpherson on Infants, p. 67. See *per* Lords Herschell and Field in *Barnardo* v. *McHugh* [1891], A. C., 388.

[9] *Queen* v. *Nash*, 10 Q. B. D., 454. *Barnardo* v. *McHugh* [1891], A. C., 88.

period of nurture ;[1] but it must in each case be guided by a consideration of what is best in the interests of the child.

After the mother, the Court will prefer the putative father to the mother's relatives.[2]

The right of guardianship of children, the result of intercourse between persons governed by different laws, is determined by the Hindu law, the Mahomedan law, or the law applicable to other persons, according as they have been brought up as Hindus, Mahomedans, or otherwise.[3]

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[1] *Empress* v. *Pemantle*, I. L. R., 8 Calc., 971. See *Shahjehan* v. *Munro*, 5 S. D. A. N.-W. P., 39 ; s.c. 1 Sel. Rep., S. D. A. N.-W. P., 16 ; *Queen* v. *Fletcher*, Perry's Oriental Cases, 109; *Ex parte Intiazzoonissa*, 2 Madras Notes of Cases, 107.

[2] *Re Kerr*, 12 L. R. Ir., 642 ; *Queen* v. *Nash*, 10 Q. B. D., 454.

[3] See *Myna Boyee* v. *Ootaram*, 8 Moo. I. A., 400

CHAPTER IX.

Appointment of Testamentary Guardians.

Nomination of guardian by father.

By the several systems of law administered in British India a father is entitled to appoint guardians of his minor children by his will.

Hindus.

An adult[1] Hindu father can, by word or writing, nominate a guardian for his children, and he is unrestricted in the choice of such guardian. He may exclude even the mother from the guardianship.[2]

Mahomedan law.

Under Mahomedan law not only can a father[3] appoint by will a guardian of the property of his minor children,[4]

Guardianship of property.

but, as we have seen,[5] apart from any such specific appointment, the executor of a father's will is entitled to the custody of the property of his minor children.

Guardianship of person.

The father cannot by will interfere with the rights, which the mother or other female relations can during his lifetime assert against him,[6] but apparently he can by will appoint a guardian, who could exercise rights similar to those enjoyed by himself.

It does not appear that, apart from a specific appointment as guardian, the father's executor can act as guardian of the persons of the children, and so far as Shias are

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[1] By not incorporating sec. 47 of the Indian Succession Act (X of 1865) in the Hindu Wills Act (XXI of 1870) the Legislature has indicated its opinion that the privilege enjoyed by adult Hindu fathers should not be extended to minors.

[2] *Soobah Doorgah Lal Jha* v. *Neelanund Singh*. 7 W. R. C. R., 74.

[3] A Mahomedan minor cannot make a will under the Sunni law, Baillie's Digest, Part I, p. 669; under the Shiah law he can do so, *ante* p. 30.

[4] Macnaghten's Mahomedan Law Principles, chap. viii, princ. 4. *Alimodeed Moallem* v. *Syfoora*, 6 W. R. M. R., 125.

[5] *Ante*, p. 61.

[6] *Ante*, pp. 61 and 62.

concerned, there is authority that he has no such power as against the mother[1].

There is nothing to prevent a father appointing the mother guardian of the person or property of his minor children.[2] Appointment of mother.

The capacity of Hindu and Mahomedan fathers to appoint by their wills guardians for their children after their deaths, has been recognized by the sovereign power of this country since the date of the Permanent Settlement.[3] Power recognised by Government. Ben. Reg. V of 1799.

Act XL of 1858, in enacting a procedure for the appointment by the Court of a guardian to the persons and estates of minors in Bengal required[4] the Court to grant a certificate of administration of the property of the minor to any person entitled under a will or deed to have charge of such property, and only permitted a guardian of the person to be appointed in the case of the father not having appointed a guardian.[5] Act XL of 1858.

The law in Bombay was similar.[6]

The Hindu Wills Act,[7] which applies to the wills of Hindus, Jains, Sikhs, and Buddhists, did not alter the testamentary powers of Hindus to appoint guardians for their children. The Hindu Wills Act.

Lastly, the Guardians and Wards Act provides[8] that in the case of a minor, who is not an European British Guardians and Wards Act.

[1] Baillie's Digest, Part II, p. 95.

[2] Macnaghten's Mahomedan Law. Precedents, chap. vii, cases 4 and 6, and appendix, Tit. Guardian 1.

[3] See Markby's Lectures on Indian Law, Lecture V, p. 76. Beng. Reg. V. of 1799; Beng. Reg. I of 1800; Mad. Reg. V of 1804, secs. 18 and 19, and Act XIX of 1873, sec. 199.

[4] Sec. 7. *Puroma Soonduree* v. *Tara Soonduree*, 9 W. R. C. R, 343; *Roodur Chund Roy* v. *Bhoobun Mohun Acharjee*, 16 Ben. S. D. A., 350; *Bhoobun Mohinee* v. *Poorno Chunder Banerjee*, 17 W. R. C. R., 99. Under Act IV (B.C.) of 1870, sec. 31, the Court of Wards, in appointing a guardian, had to prefer a testamentary guardian, unless he be disqualified or unfit. The present law is different, see Act IX (B.C.) of 1879, sec. 20; but the position of a testamentary guardian is to some extent still recognized, see secs. 44 and 45, *post*, chap. xxxii.

[5] Sec. 7.

[6] Act XX of 1864, sec. 8.

[7] XXI of 1870.

[8] VIII of 1890. Sec. 6. Read with sec. 5, sec. 6 shews that it was intended to include the case of a testamentary appointment; see also sec. 7, *post*, chap. xi. The Court may remove a testamentary guardian, see sec. 39, *post*, chap. xii.

subject, nothing in that Act "shall be construed to take away or derogate from any power to appoint a guardian of his person or property or both which is valid by the law to which the minor is subject.

Persons other than Hindus and Mahomedans.

So far as persons, who were not governed by Hindu or Mahomedan law, were concerned, Act XXV of 1838, which applied to wills made between the 1st of February 1839,[1] and the 1st of January 1866, seems[2] to have taken away from minor fathers the power of appointing guardians to their children by will; but by the Indian Succession Act,[3] which applies to wills made by persons other than Hindus, Mahomedans and Buddhists[4] on and since the 1st of January 1866, a father, whatever his age may be, may by will, appoint a guardian or guardians for his children during minority.

Appointment by mother.

Except in the case of European British subjects, the mother has no power to appoint a guardian, but the Court, in appointing a guardian after her death may consider an appointment by her, it being at the least an expression of her wish.[5]

European British subjects.

The appointment of guardians of European British subjects[6] is dealt with in the Guardians and Wards Act,[7] sec. 5 of which is as follows :—

"(1) Where a minor is an European British subject, a guardian or guardians of his person or property, or both, may be appointed by will or other instrument to take effect on the death of the person appointing; (*a*) by the father of the minor; or (*b*) if the father is dead or incapable of acting, by the mother.[8]

"(2) Where guardians have been appointed under sub-sec. (1) by both parents, they shall act jointly."

[1] Sec. 31.
[2] Sec. 5.
[3] Act X of 1865, sec. 47.
[4] Sec. 331.
[5] See *In re Kaye*, L. R., 1 Ch., 387. See Act VIII of 1890, sec. 17 (2), *post*, p. 99.
[6] See *ante*, p. 66, note 2.
[7] VIII of 1890.
[8] Where after the death of the mother, who has appointed under these circumstances, the father becomes capable of acting, the Court may appoint him sole guardian or joint guardian to act with the guardian appointed by the mother. Act VIII of 1890, sec. 15 (3).

Not only must a Court recognise such appointment, but the appointee can only be deprived of the guardianship for the causes which would justify the removal of a guardian appointed by the Court.[1] Removal of testamentary guardian.

The same Act further provides[2] that "on the death of a father, being an European British subject, who has, by will or other instrument to take effect on his death, appointed a guardian of his minor child, the Court may appoint the mother to be guardian of the child jointly with the guardian appointed by the father." Appointment of mother by Court to act with testamentary guardian.

The result of this is that, although during the father's lifetime the mother is to be preferred to the father as guardian of her male children of tender years and of her female children,[3] the father's appointee is, in the absence of an appointment by the Court during the father's lifetime, entitled after his death to the guardianship, or at the least the mother is required to share it with him.

Parents cannot appoint guardians to their illegitimate children,[4] whatever may be their race. There is, however, nothing to prevent the Court, when appointing a guardian, from taking into consideration an appointment by the mother, or even by the putative father of illegitimate children.[5] Illegitimate children.

Probate establishes the authority of a testamentary appointment;[6] but a will containing the appointment of a guardian can, if proved by evidence, be used as proof of such appointment, although no probate of it may have been granted.[7] Evidence of appointment.

As to the mode of dealing with a dispute as to the appointment see *post*, Chap. XI.

A guardian may, in all cases,[8] be appointed by a deed to take effect upon the death of the father; but such Appointment by deed.

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[1] Act VIII of 1890, sec. 39, *post*, chap. xii.

[2] Sec. 15 (2).

[3] Act VIII of 1890, sec. 17, *ante*, p. 66.

[4] See *Ward* v. *St. Paul*, 2 Brown's Chancery Cases, 583, and *Ex parte Glover*, 4 Dowl. P. C., 291.

[5] *Ward* v. *St. Paul*, 2 Brown's Chancery Cases, 583.

[6] *Jogesh Chunder Chakravarti* v. *Umatara*, 2 C. L. R., 577.

[7] *Alikhan Badlukhan* v. *Panibai*, I. L. R., 19 Bom., 832.

[8] As to European British subjects, see *ante*, p. 72.

appointment is in its nature testamentary,[1] and may be revoked by a subsequent will.

No particular form of instrument appointing a guardian is necessary. Although a will may not have been executed with all the formalities required by law, the Court may, except perhaps in the case of a will to which the Indian Succession Act[2] is applicable, act upon an appointment of guardian made therein, provided it appear that such appointment expresses the wishes of the testator.[3]

Restriction as to property.

There is nothing to prevent a father limiting the appointment to a portion only of the minor's property, and he can appoint as many guardians as he wishes.

Number of guardians.

Guardianship of property not acquired through father.

A father can appoint guardians of property, which has devolved upon his children otherwise than through him, but, should the instrument which creates the minor's interest appoint a person to have charge of the property thereby bequeathed or given during the minority of the child, the father cannot interfere with such appointment by himself appointing a guardian. Any donor by will or deed of property to a minor may appoint a trustee or manager of such property during the minority of the donee; but he cannot impose any conditions or restrictions upon the management of property which the minor may have acquired otherwise than by such will or deed.

Form of appointment.

It is not necessary that any special form of words should be used in appointing a guardian. The expression of the intention is alone requisite.[4]

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[1] See 12 Car. II, c. 24, sec. 8, *Ex parte Ilchester*, 7 Ves. 348, 367. In the case of persons other than Hindus and Mahomedans a minor father can apparently appoint a guardian by deed. At any rate his wishes, however expressed, would be regarded by the Court.

[2] X of 1865.

[3] See *Hall* v. *Storer*, 1 Young and Collyer, Ex. 550.

[4] Simpson on Infants, 2nd Edn., p. 217. The expressions "I expect my father will take care to see my child educated in the Protestant religion" (*Teynham* v. *Lennard*, 4 B. P. C., 302)—"I desire that my son may be under the care and direction of A B." (*Bridges* v. *Hales*, Mos. 108.) "I request Miss M., if she shall be alive at my decease, to take upon herself the management and care of the house and of my children. (*Miller* v. *Harris*, 14 Sim., 540), have each been held to be sufficient to effect a valid appointment; and in another case (*Mendes* v. *Mendes*, 14 Ves. Sen., 89), Hardwicke, L. C., considered

Who can be appointed.

Individuals only can be appointed guardians, and where the testator appointed a trading partnership as a firm, and not as individuals, guardians of his children, the Court of Chancery refused to recognise the appointment.[1] A father cannot appoint a company, an institution, or a Court[2] to be guardian of his children.

Delegation of powers.

A testamentary guardian, although he takes precedence of other guardians, and is placed *in loco patris* having the same powers as the parent over the minor,[3] cannot, except, so far as it may be necessary to entrust his ward to a tutor or schoolmaster, delegate his trust to another,[4] either during his lifetime or by will, and the trust does not pass to his executors or administrators.[5]

Right of testamentary guardians.

A testamentary guardian is entitled to act, until he is removed by the Court, or the Court of Wards assumes superintendence, or the ward ceases to be a minor.[6] In the case of a female ward his powers as guardian of her person cease on her marrying a husband, who is not unfit to be guardian of her person.[7]

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that the words "I direct that my wife shall have the education and maintenance of my children" might amount to a devise of the guardianship. A direction to executors to manage property during the minority of the legatee constitutes them guardians of the property, *In the matter of Srish Chunder Singh*, I. L. R., 21 Calc., 206.

[1] *DeMazar* v. *Pybus*, 4 Ves. Jun., 644.

[2] *Rowshun Jehan* v. *Collector of Purneah*, 14 W. R. C. R., 295.

[3] *Eyre* v. *Shaftesbury*, 2 Peere. Wms., 123.

[4] *Villareal* v. *Mellish*, 2 Swanst., 536; s.c. *Mellish and DeCosta*, 2 Atk., 14.

[5] See Forsyth on the Custody of Infants, p. 111, and cases cited in note (*n*) to that page.

[6] Act VIII of 1890, secs. 39 and 41, *post*, chaps. xii, xvi, and xviii.

[7] *Ibid*, sec. 41, *post*, chaps. xvi and xviii.

CHAPTER X.

Loss of Right of Guardianship.

Although the powers of a guardian only cease in the events set forth in Act VIII of 1890, sec. 41,[1] the Courts will not confirm,[2] or give effect to,[3] the rights of natural and testamentary guardians where those rights have been lost by misconduct or unfitness for the trust.

Loss of right by father.

Mr. Story, in his work on Equity Jurisprudence,[4] observes, that "although in general parents are entrusted with the custody and the education of their children, yet this is done upon the natural presumption that the children will be properly taken care of, and will be brought up with a due education in literature and morals and religion, and that they will be treated with kindness and affection. But, whenever this presumption is removed; whenever (for example) it is found that a father is guilty of gross ill-treatment or cruelty towards his infant children; or that he is in constant habits of drunkenness and blasphemy or low and gross debauchery, or that he professes atheistical or irreligious principles; or that his domestic associations are such as tend to the corruption and

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[1] (*a*) By his death, removal or discharge:
by the Court of Wards assuming superintendence:
(*c*) by the ward ceasing to be a minor:
(*d*) in the case of the guardianship of the person of a female ward, by her marriage to a husband who is not unfit to be guardian of her person, see *post*, chaps. xvi and xviii.

[2] As for instance, where an application is made for the appointment of a guardian.

[3] As for instance, where the guardian is invoking the aid of the summary power of the Court (see *post*, chap. xx).

[4] § 1341.

contamination of his children, or that he otherwise acts in a manner injurious to the morals or interests of his children; in every such case the Court of Chancery will interfere and deprive him of the custody of his children, and appoint a suitable person to act as guardian and take care of them and to superintend their education."[1]

But before the Court can interfere there must be a distinct danger of the child being injured, or contaminated by remaining in the custody of its father. The Court will draw a distinction between harshness and cruelty, and will interfere in the latter case only. Occasional acts of severity are insufficient to justify interference. There must be a persistent and continuous course of ill-treatment.[2] The fact that the father is living in adultery would also be insufficient, where he is careful not to bring his children into any contact with his mistress.[3] In determining any question of this kind attention must be paid to the customs of the people and the position of the parties.[4]

Religious principles of father.

The Court will not interfere with the rights of the father on account of his religious principles,[5] nor does he by changing his religion lose his right to the custody of his children.[6]

It has been held in England that the absence of all religious principles is a good ground for interference, and where the father's religious principles are such as to

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[1] See Act VIII of 1890, sec. 19 (*b*), *post*, chap. xi. *Wellesley* v. *Beaufort*, 2 Russ., 1, on appeal *Wellesley* v. *Wellesley*, 2 Bli. N. S., 124; *Mytton* v. *Holyoake*, Macpherson on Infants, p. 149; *Anonymous*, 2 Sim. N. S., 54; *Swift* v. *Swift*, 34 Beav., 266, 34 L. J., Ch., 209; *De Manneville* v. *De Manneville*, 10 Ves., 52; *Re Fynn*, 2 G. & S., 457.

[2] *Curtis* v. *Curtis*, 5 Jur. N. S., 1147. If a father fails to stand forward to protect his children's just rights, or connives at their being deprived of the same, their mother, by Hindu law, can act as their guardian: *Baee Gunga* v. *Dhurumdass Nurseedass*, Bellasis, 16.

[3] *R.* v. *Greenhill*, 4 A. & E., 624; *Ball* v. *Ball*, 2 Sim., 35.

[4] See *Kalidas* v. *Subbamma*, I.L.R., 7 Mad., 29.

[5] *Curtis* v. *Curtis*, 5 Jur. N. S., 1147, see *post*, chap. xxii.

[6] See Act XXI of 1850; *Muchoo* v. *Arzoon Sahoo*, 5 W. R. C. R., 235; *Queen* v. *Bezonji*, Perry's Oriental Cases, 91. As to the effects of his change of religion upon the religious education of his children, see *post*, chap. xxii.

justify in his mind and to cause him to represent to others as moral and worthy of recommendation, conduct which other persons would consider immoral, or when the father by his opinions and conduct demonstrates that he must and does deem it a matter of duty, which his principles impose upon him, to recommend to his children that conduct in some of the most important relations of life as moral and virtuous, which the law considers as immoral and vicious, then the Court would interfere[1]. Speculative religious opinions are not any ground for interference, unless they are such as the law considers dangerous to society.[2]

It is, however, difficult to say to what extent the Courts of this country would interfere in cases where the father's religious opinions are such as would, if he had lived in England, have justified his removal by the Court of Chancery. Probably the Court would in an extreme case consider itself bound to interfere; but it would have to make such allowance as the customs, habits, and opinions of the inhabitants of this country might require to be made.

Waiver of right by father.

A father may also lose his right to the guardianship of his children, and to the control of their education, where he has permitted another person to maintain and educate them, and it would be detrimental to the interests of the children to alter the manner of their maintenance or the course of their education. The Court will not, when he has acquiesced for some time, permit him arbitrarily or capriciously to alter the mode of their maintenance and education, or to take them from the custody in which he has allowed them to remain.[3]

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[1] *Shelley* v. *Westbrooke*, Jac. 266 n.; *Thomas* v. *Roberts*, 3 D. G. & S., 758.

[2] See *Lyons* v. *Blenkin*, Jac., 256; *Curtis* v. *Curtis*, 5 Jur. N. S., 1147.

[3] *In the matter of Joshy Assam*, I. L. R., 23 Calc., 290. *In the matter of Saithri*, I. L. R., 16 Bom., 307; *Venkamma* v. *Savitramma*, I. L. R., 12 Mad., 67. In *Ex parte Hopkins*, 3 Peere Wms. 154, Lord Chancellor King said:—"The father is entitled to the custody of his own children during their infancy, not only as guardian by nurture, but by nature, and it cannot be conceived that because another thinks fit to give a legacy, though never so great, to my daughters, therefore I am by that means to be deprived of a right

Under the Hindu Law a guardian might lose his rights by permanently emigrating, becoming a recluse or entering a religious order.[1]

Agreement to give up custody.

An agreement by the father to give up entirely the custody and control of his children to their mother is against the policy of the English law,[2] unless the father be by such agreement doing only what the law would compel him to do,[3] as where he has been guilty of gross misconduct, or there is danger of moral contamination to the child if it remains with him; also where the father has permitted the mother or some other person to educate, and have the custody of, the child without himself interfering with its education.

According to the same law the father can at any time rescind an agreement made with persons other than the mother to give up to them the custody of his child,

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which naturally belongs to me—that of being their guardian." But if the father has once permitted to his children the advantages of a special fund provided for their education and support, he cannot afterwards prevent their receiving the benefits of that fund, See *Lyons* v. *Blenkin*, Jac. 245. In one case (*Colston* v. *Morris*, Jac. 257 n,) where a sum of money was left to a minor with a direction that his education should be committed to trustees, and a legacy was also left to the father on condition of his not interfering in it, and the father had accepted the legacy, the father was required to enter into an undertaking not to interfere with the education. If he had not accepted the legacy, the Court could not have forced him to accept its conditions. In *In re Agar Ellis*, 24 Ch. D. at p. 333, Cotton, L. J., said :—"The father, although not unfitted to discharge the duties of a father may have acted in such a way as to preclude himself in a particular instance from insisting on rights he would otherwise have; as when a father has allowed, in consequence of money being left to a child, the child to live with a relative, and be brought up in a way not suited to its former station in life or to the means of the father. Then the Court says, you have allowed that to be done, and to alter that would be such an injury to the child that you have precluded yourself from exercising your power as a father in that particular respect, and then the Court interferes to prevent the father from having the custody of the child, not because he is immoral or has forfeited all his rights, but because in that particular instance he has so acted as to preclude himself from insisting upon what otherwise would be his right."

[1] See Sutherland's Synopsis of the Law of Adoption, p. 215, In the matter of *Ishwar Chunder Surma*, 6 Ben. S. D. A. 1850, p. 471.

[2] See *Hope* v. *Hope*, 8 D. M. & G. 731; and *St. John* v. *St. John*, 11 Ves. Jun. 531.

[3] *Swift* v. *Swift*, 34 Beav., 266; 34 L. J., Ch., 209.

provided that it has not been so acted upon that a revocation of it would injuriously affect the child.[1]

This principle might be applied in this country to any natural guardian of a minor, but the question in each case would be whether it be in the interests of the minor that the agreement should be enforced.

Loss of right by other guardians.

A mother, or other guardian,[2] would also lose all right by misconduct[3] or waiver.[4] The immoral character of a mother would in most cases be a source of danger at any rate to her female children.

Remarried Hindu widows.

Hindu widows do not on remarriage *ipso facto* lose their right of guardianship of their children,[5] but, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the husband the guardian of his children, the father, or paternal grandfather, or the mother or paternal grandmother, or any male relative, of the husband can apply to the highest Court having original jurisdiction in civil cases in the place where the husband was domiciled at the time of his death for the appointment of a guardian,[6] and the Court may, if it should think fit, appoint such guardian, who, when appointed, shall be entitled to have the care and custody of such children during their minority

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[1] *Hill* v. *Gomme*, 1 Beav., 541; on appeal, 5 M. & C., 250.

[2] *Abasi* v. *Dunne*, I. L. R., 1 All., 598. Baillie's Digest, Part I, p. 434.

[3] *Venkamma* v. *Savitramma*, I. L. R., 12 Mad., 69; *Skinner* v. *Orde*, 14 Moo. I. A., 309. Baillie's Digest, Part I, pp. 431 & 432.

[4] *Venkamma* v. *Savitramma*, I. L. R., 12 Mad., 69. *In the matter of Saithri*, I. L. R., 16 Bom., 307.

[5] Act XV of 1856, sec. 5. This Act has been declared to be in force throughout British India, except as regards the Scheduled Districts (Act XV of 1874, sec. 3), and in the Santhal Pergunnahs (Reg. III of 1872, sec. 3 as amended by Reg. III of 1886). As to the Scheduled Districts to which it has been applied, *see* General Acts 1854—66, Edn. 1887, p. 107.

[6] Act XV of 1856, sec. 3. The application may be made under this Act, or under the Guardians and Wards Act (VIII of 1890). In the latter case the conditions necessary for an application under Act VIII of 1890 would apply (*post*, chap. xi.). Act XV of 1856 has no application to women who, by the rules of their caste, are capable of contracting a second valid marriage. In *Kishen* v. *Enayet Hossain*, S. D. A. N.-W. P., 25th June 1861, it was held that a woman of the Aheer caste does not by remarriage forfeit her rights to act as guardian of her son by her first marriage.

in the place of their mother, and in making such appointment the Court must be guided, as far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother.[1]

When the children have not property of their own sufficient for their support and proper education whilst minors, the appointment can only be made with the consent of the mother, unless the proposed guardian gives security for the support and proper education of the children whilst minors.[2]

Hindu law. Effect of loss of caste or change of religion on right of guardianship. Act XXI of 1850.

Under the Hindu law loss of caste involved a loss of the right of guardianship of the person and property of minors ;[3] but since the passing of Act XXI of 1850 such right of guardianship ceased to be affected by a change of religion or loss of caste.[4] Where, however, the appointment of a guardian is made by a Court, the fact that the person proposed is out of caste would be a matter for consideration.

Certain religious ceremonies which it is the duty of the guardian of a Hindu minor to perform on behalf of his ward, cannot be performed by a guardian who is out of caste, or who has changed his religion. In that case they must be performed by the person next entitled to the guardianship of the minor, and it is the duty of the guardian to make over to such person out of the estate of the minor the requisite funds to pay the expenses of those ceremonies.

Mahomedan law.

Remarriage.

After becoming a widow a mother, according to Mahomedan Law, retains her right to the custody of her infant children. Her right, and that of any other female guardian, ceases on marriage with a stranger, *i.e.*, a person outside the prohibited degrees of relationship. The right will revert on the new marriage being dissolved by death or otherwise.[5]

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[1] Act XV of 1856, sec. 3. See *Khushali* v. *Rani*, I. L. R., 4 All., 195.

[2] Act XV of 1856, sec. 3.

[3] See *Fuggoo* v. *Ranah*, 4 W. R. M. A., 3.

[4] *Muchoo* v. *Arzoon Suhoo*, 5 W. R. C. R., 235 ; *Kannaki Ram* v. *Biddyaram*, I. L. R., 1 All., 549.

[5] *Beedhun* v. *Fuzuloollah*, 20 W. R. C. R., 411; *Fuseehun* v. *Kajo*, I.L.R., 10 Calc., 15. Baillie's Digest, Part I, 432 ; Part II, p. 96. Macnaghten's

Neglect to support.

Under the same law, where a mother or other person entitled to the custody neglects to support the child, her right to the custody ceases,[1] and devolves upon the person next entitled to such right.

Change of religion by guardian.

A change of religion by the guardian does not disqualify him,[2] but in the case of a guardian other than the father, the Court might consider a person who had changed his religion to one other than that professed by the father of the children, and who would therefore be unlikely to do his duty with reference to the religious education of his wards, unfit to be appointed guardian.[3]

In spite of the provisions of Act XXI of 1850, there is nothing to prevent a testator from providing that the person whom he is appointing guardian shall be disqualified or excluded from office on changing his religion.[4]

Testamentary guardian.

A testamentary guardian can only be removed or disregarded under the circumstances which justify the removal of a guardian appointed by the Court.[5]

Principles of Mahomedan Law, chap. viii, princ. 9. Hedaya, vol. i, Bk. iv, chap. xiv.

[1] See *Ameeroonissa*, 11 W. R. C. R., 297. Tagore Law Lectures, 1873, p. 486. Hedaya, vol. IV, Bk. xliv, sec. 7.

[2] Act XXI of 1850. *Muchop* v. *Arzoon Sahoo*, 5 W. R. C. R, 235. See *in the matter of Mahin*, 13 B. L. R., 160, in which a question as to the right to give in marriage, rather than a question as to the right of custody, was determined.

[3] See Act VIII of 1890, sec. 39, *post*, chap. xii. In appointing a guardian the Court must take the religion of the minor into consideration (Act VIII of 1890, sec. 17 (2) *post*, p. 98), and would therefore rarely appoint a guardian who professed a religion different from that of the minor.

[4] See *Anund Coomar Gangooly* v. *Rakhal Chunder Roy*, 8 W. R. C. R., 278.

[5] Act VIII of 1890, sec. 7 (3), *post*, pp. 94 and 97, and sec. 39, *post*, chap. xii.

CHAPTER XI.

Appointment of Guardians by Civil Courts.

Certain of the Civil Courts have power to appoint guardians of the persons and property of minors, who are not under the superintendence of Courts of Wards, and thereby to supersede the rights of natural and testamentary guardians.[1] Power of Courts.

Soon after the establishment of the Court of Wards in Bengal, it was found necessary to give to the Civil Courts powers to nominate guardians of minors, over whom that Court possessed no power. The first step in this direction was the enactment of Bengal Regulation I of 1800, which authorised Zillah Judges, where there were no testamentary guardians, to nominate guardians to disqualified landholders not subject to the authority of the Court of Wards. Ben. Reg. I of 1800.

This Regulation, with others[2] relating to the same subject, was repealed by Act XL of 1858, which provided a machinery for the appointment of managers of the estates and guardians of the persons of minors (not being European British subjects)[3] residing in Bengal outside the limits of the original civil jurisdiction of the High Court. Law in Bengal.

Similar provision was made in the Madras Presidency by Madras Regulations V of 1804, sec. 20, and X of 1831, sec. 3, and in Bombay by Act XX of 1864, which was in terms similar to Act XL of 1858. Madras. Bombay.

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[1] *Post*, pp. 93 and 94. Except they are unfit to be guardians, the Court cannot supersede the rights of fathers and testamentary guardians, Act VIII of 1890, sec. 7 (3), *post*, pp. 94 and 97, sec. 19, *post*, p. 96, and sec. 39, *post*, chap. xii.

[2] Act XL of 1858, sec. 1.

[3] See *Callychurn Mullick* v. *Bhuggobuttychurn Mullick*, 10 B. L. R., 231.

Guardians and Wards Act, 1890.

Acts XL of 1858 and XX of 1864, and the above sections of the Madras Regulations were all repealed by the Guardians and Wards Act, 1890,[1] which applies to the whole of British India,[2] and contains the present law on the subject.[3]

Saving of proceedings, &c., under repealed enactments.

All proceedings had, certificates granted, allowances assigned, obligations imposed, and applications, appointments, orders and rules made, under any of the repealed enactments, are, so far as may be, to be deemed to have been respectively had, granted, assigned, imposed and made under Act VIII of 1890, and any enactment or document referring to any of the repealed enactments, is, so far as may be, to be construed to refer to the repealing enactment or to the corresponding portion thereof.[4]

Saving of jurisdiction of Courts of Wards and High Courts.

The Guardians and Wards Act has no effect upon the jurisdiction or authority of the Courts of Wards, nor does it take away any power possessed by the High Courts.[5]

Persons entitled to apply for orders.

The persons entitled to apply for an order for the appointment of a guardian are :[6]—

(*a*) the person desirous of being, or claiming to be,[7] the guardian of the minor, or

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[1] Act VIII of 1890, sec. 2 (1).

[2] Including the scheduled districts; *Chakrapani* v. *Varalalamma*, I. L. R., 18 Mad., 227.

[3] This Act came into force on the 1st of July 1890. It applies to the whole of India procedure similar in many respects to that which was adopted by the High Courts in appointing guardians of minors. It has also brought the law on this subject more into line with the law as administered in England. The object of Acts XL of 1858 and XX of 1864, was not to supersede the rights of those who were entitled either naturally or by appointment to the guardianship of a minor's person or estate, but to place those persons under the control and subject to the supervision of the Civil Courts. The new Act protects (secs. 19 and 7 (3),) the rights of fathers, husbands, testamentary appointees, and in the case of European British subjects mothers also (sec. 17 (4)) : but except that their natural rights may give them advantages in a competition for the appointment of a guardian (see sec. 17 (2)), the Courts can disregard the rights of other relations. The Courts now have to consider solely the interests of the minors (sec. 17, *post*, p. 98.)

[4] Act VIII of 1890, sec. 2, see sec. 51, *post*. The Act has no operation upon persons who ceased to be guardians before the passing of the Act: *Vallabdas Hirachand* v. *Krishnabai*, I. L. R., 17 Bom., 566.

[5] Act VIII of 1890, sec. 3. As to the powers of the High Courts to appoint guardians, see *post*, chap. xiv.

[6] Act VIII of 1890, sec. 8.

[7] *i.e.*, as natural or testamentary guardian.

(*b*) any relative or friend of the minor, or

(*c*) the Collector of the District or other local area within which the minor ordinarily resides or in which he has property,[1] or

(*d*) the Collector having authority with respect to the class to which the minor belongs.

On the discharge of a guardian appointed or declared by the Court, or on his ceasing, under the law to which the ward is subject, to be entitled to act, or upon the death or removal of such guardian or of a testamentary guardian, the Court can appoint a guardian of its own motion.[2]

Application only to be made when necessary.

The Act does not compel any one to apply for the appointment of a guardian. It merely permits an application to be made,[3] and unless there be no guardian or the natural or testamentary guardian be unfit, or it be otherwise necessary for the minor's welfare that a guardian should be appointed by the Court, an application is unnecessary. A person unnecessarily applying may render himself liable for costs.[4]

When application can be made.

An application for the appointment of a guardian can be made at any time up to the attainment of majority by the minor,[5] and no lapse of time can of itself be any objection to the making of an order,[6] as, if it were so, the

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[1] Of any kind. In Bengal, the sanction of the Board of Revenue must be obtained to any application which the Collector may desire to make under sec. 8 (*c*) or (*d*). Such sanction can only be given after reports have been submitted by the Collector and Commissioner in accordance with Rules 9 and 10, sec. 1 of the Court of Wards Rules. If the application is for the purpose of having a private person appointed guardian, the Board's sanction will not be required. Court of Wards' Rules, sec. 10, Rule 6.

Rule 383 of the High Court, N.-W. P., provides that when the Court does not allow out of the estate the costs of an application made by the Collector of the district under this section, the Court shall record the special circumstances in consequence of which it has not allowed such costs out of the estate.

[2] Act VIII of 1890, sec. 42, *post*, chap. xii.

[3] *Sham Kuar* v. *Mohanunda Sahoy*, I. L. R., 19 Calc., 308.

[4] Act VIII of 1890, sec. 49.

[5] *i.e.*, in the cases of persons domiciled in British India until he attains the age of 18 years, see *ante*, pp. 8 & 12.

[6] See *Puroma Soondaree* v. *Tara Soondaree*, 9 W. R. C. R., 343; *aliter per* Ainslie, J., in *Mahomed Hossein* v. *Akbar Hossein*, 17 W. R. C. R., 275. An application for an order, which if successful would in effect prolong

minor might suffer through the negligence of those whose duty it is to protect him.

To what Court application to be made.

If the application is with respect to the guardianship of the person of the minor, it must be made to the District Court [1] having jurisdiction in the place where the minor ordinarily resides.[2]

If the application is with respect to the guardianship of the property of the minor, it must [3] be made either to the District Court having jurisdiction in the place where the minor ordinarily resides,[4] or to a District Court having jurisdiction in a place where he has property.[5]

If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.[6] Such order is appealable to the High Court.[7]

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the minority of a minor from 18 to 21, should not be granted when the alleged minor is on the point of attaining the age of 18, unless under particular circumstances such as weakness of intelligence or absolute necessity for the purpose of preserving property. *Muhamdee* v. *Nazirun*, I. L. R., 6 Calc., 19; 6 C. L. R., 210.

[1] This means the principal Civil Court of Original Jurisdiction, and includes a High Court in the exercise of its Ordinary Original Civil Jurisdiction, Act VIII of 1890, sec. 4 (4). The powers to invest Subordinate Courts with jurisdiction in the appointment of guardians have been taken away by the Guardians and Wards Act, which has repealed the Acts which gave such powers.

[2] Act VIII of 1890, sec. 9 (1). Should it happen that the minor has more than one residence and does not reside in one more than in another, then the application can be made to the Court of the district in which either of such residences is situate; but it is more convenient and proper that the application should be made to the Court of the district in which is situate that one of these residences which the minor is actually inhabiting at the time of the application, as it will be then easier for the Court to exercise its duty of appointing a guardian of the minor's person. See *Maganbhai Purshotamdas* v. *Vithoba*, 7 Bom. H. C. R., A. C., 7.

[3] Act VIII of 1890, sec. 9 (2).

[4] See above note 2.

[5] *i.e.*, property of which a guardian can be appointed under the Act (see *post*, p. 102). An order made by a District Court having jurisdiction would apply also to property of the minor outside the limits of the jurisdiction of the Court.

[6] Act VIII of 1890, sec. 9 (3).

[7] *Ibid.*, sec. 47.

A guardian of the person of a minor residing out of British India cannot be appointed, although it may be sometimes necessary to appoint a guardian of his property in British India. Minor out of British India.

If the application is not made by the Collector, it must be [1] by petition signed and verified in manner prescribed by the Code of Civil Procedure for the signing and verification of a plaint,[2] and stating, so far as can be ascertained,— Form of application.

(*a*) the name, sex, religion, date of birth and ordinary residence of the minor ;

(*b*) where the minor is a female, whether she is married, and, if so, the name and age of her husband ;

(*c*) the nature, situation and approximate value of the property,[3] if any,[4] of the minor ;

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[1] Act VIII of 1890, sec. 10. A form of Petition has been prescribed in Bengal, see Rule of High Court No. 1, dated the 17th March 1891. It follows the terms of the section, and in addition provides that the applicant must state his father's name, and his place of residence and his degree of relationship, if any, to the minor.

[2] The following are the sections of the Code of Civil Procedure (Act XIV of 1882), which deal with this subject :—

Sec. 51. The plaint shall be signed by the plaintiff and his pleader (this includes his advocate or attorney (sec. 2) (if any), and shall be verified at the foot by the plaintiff, or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case :

Provided that, if the plaintiff is, by reason of absence or for other good cause, unable to sign the plaint, it may be signed by any person duly authorised by him in this behalf.

Sec. 52. The verification must be to the effect that the same is true to the knowledge of the person making it, except as to matters stated on information and belief, and that as to those matters he believes it to be true. The verification shall be signed by the person making it.

[3] *i.e.*, the whole of the property of the minor of whatever description and wheresoever situate. The application for the appointment of a guardian should refer merely to the property to which the minor is entitled, or of which the applicant claims charge, and it has nothing to do with the estate of any deceased person through whom the minor succeeds to any property (*Koosumkaminee* v. *Chunderkant Mookerjee*, 23 W. R. C. R. 346), as the appointment of a guardian is entirely distinct from a certificate to collect the debts of such deceased person: *Raesunnissa* v. *Khujoorunnissa*, 10 W. R. C. R., 462.

[4] These words "if any" shew that the Court can exercise its jurisdiction under the Act and appoint a guardian of the person of a minor in cases where the minor is possessed of no property. Under Act XL of 1858, a guardian of the person

(*d*) the name and residence of the person having the custody or possession of the person or property of the minor ;

(*e*) what near relations the minor has, and where they reside ;

(*f*) whether a guardian of the person or property, or both, of the minor has been appointed by any person entitled or claiming to be entitled by the law to which the minor is subject to make such an appointment ;

(*g*) whether an application has at any time been made to the Court or to any other Court with respect to the guardianship of the person or property, or both, of the minor, and, if so, when, to what Court, and with what result ;

(*h*) whether the application is for the appointment or declaration of a guardian of the person of the minor, or of his property, or of both ;

(*i*) where the application is to appoint a guardian, the qualifications of the proposed guardian ;

(*j*) where the application is to declare a person to be a guardian, the grounds on which that person claims ;

(*k*) the causes which have led to the making of the application ; and

(*l*) such other particulars, if any, as may be prescribed or as the nature of the application renders it necessary to state.

If the application is made by the Collector, it must be by letter addressed to the Court and forwarded by post or in such other manner as may be found convenient, and must state as far as possible the above particulars.

The application must be accompanied by a declaration of the willingness of the proposed guardian to act and the

could only be appointed in the case of a certificate to manage the minor's property being granted (see secs. 7 & 11). The older English cases shewed that the Court of Chancery could not exercise its jurisdiction except there be property. See however the recent cases of *Barnardo* v. *McHugh* [1891] A. C. 388, and *In re McGrath* [1893] 1 Ch. 143.

declaration must be signed by him and attested by at least two witnesses.[1]

Copy of petition to be sent to Collector in N.-W. P.

In the North-West Provinces, when the petition states that the property of the minor consists of land or any interest in land, a copy of the petition must be sent free of charge to the Collector of the district in which such property or any part of it is situate.[2]

Procedure on admission of application.

If the Court is satisfied that there is ground for proceeding on the application, it shall fix a day for the hearing thereof, and cause notice of the application and of the date fixed for the hearing[3]—

(*a*) to be served in the manner directed in the Code of Civil Procedure[4] on—

(i) the parents of the minor if they are residing in British India,

(ii) the person, if any, named in the petition or letter as having the custody or possession of the person or property of the minor,

(iii) the person proposed in the application or letter to be appointed or declared guardian, unless that person is himself the applicant, and

(iv) any other person to whom, in the opinion of the Court, special notice of the application should be given,[5] and

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[1] See Act VIII of 1890, sec. 17 (5), *post*, p. 100. In Bengal the declaration must be at the foot of the application and must be in the following form: "I ....., the guardian proposed in the above application, do hereby declare that I am willing to act as such." High Court Rule of 4th December 1891.

[2] Rules of High Court, N.-W. P., Rule 383.

[3] Act VIII of 1890, sec. 11(1). The procedure prescribed in this section must be strictly followed, and no guardian can be appointed without the day being fixed and the notices being served: *Jugodumba* v. *Mircha*, 17 W. R. C. R., 269. For form of notice in Bengal, see High Court Rule of 30th June 1893, published in the *Calcutta Gazette* of the 21st June 1893, Part I, p. 572 and in the *Assam Gazette* of the 24th idem, Part III, p. 526.

[4] Act XIV of 1882, secs. 72 to 92.

[5] The Court should ascertain, as far as possible, which of the minor's relations would be likely to assert claims to the guardianship of his person or property, and which would be so far friendly to his interests, as to help the Court in the selection of a guardian, and should require notices to be served on such persons. It is in many cases the safest plan to serve

(*b*) to be posted on some conspicuous part of the Court-house, and of the residence of the minor, and otherwise published in such manner as the Court, subject to any rules made by the High Court under this Act, thinks fit.

Service of notice on Collector.

The Local Government may, by general or special order, require that, when any part of the property described in a petition not made by the Collector[1] is land of which a Court of Wards could assume the superintendence,[2] the Court shall also cause a like notice to be served on the Collector in whose district the minor ordinarily resides, and on every Collector in whose district any portion of the land is situate, and the Collector may cause the notice to be published in any manner he deems fit.[3] No charge can be made by the Court or the Collector for the service or publication of such notice.[4]

Power to make interlocutory order for production of minor and interim protection of person and property.

The Court may direct that the person, if any, having the custody of the minor shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper.[5]

Receiver.

The Court would also have power to appoint a receiver to take charge of and realise the minor's property pending the hearing of the application.[6]

If the minor is a female who ought not to be compelled to appear in public, the direction for her production

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the nearest relations with notice of the application, but the matter is one for the Court to determine according to the circumstances of the case.

[1] *Ante*, p. 85.

[2] *Post*, chapters xxxi, xxxiv and xxxv.

[3] Act VIII of 1890, sec. 11 (2). Such notification has been published at page 668 of the *Calcutta Gazette* of the 8th July 1891.

[4] Act VIII of 1890, sec. 11 (3).

[5] *Ibid*, sec. 12 (1). This power is intended to be merely ancillary to the appointment of a guardian, and does not give summary powers in cases where no application for an appointment of a guardian is made. As to the summary powers of the Courts in other cases, see *post*, chapter xx.

[6] Act XIV of 1382, secs. 503 and 647.

shall require her to be produced in accordance with the customs and manners of the country.[1]

Production and custody of female.

The Court cannot place a female minor in the temporary custody of a person claiming to be her guardian on the ground of his being her husband, unless she is already in his custody with the consent of her parents, if any.[2]

Charge of property.

No person to whom the temporary custody and protection of the property of a minor is entrusted can dispossess otherwise than by due course of law any person in possession of any of the property.[3]

Penalty for contumacy.

If a person having the custody of a minor fails to produce him or cause him to be produced in compliance with such direction he is liable, by order of the Court,[4] to fine not exceeding one hundred rupees, and in case of recusancy to further fine not exceeding ten rupees for each day[5] after the first during which the default continues, and not exceeding five hundred rupees in the aggregate, and to

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[1] Act VIII of 1890, sec. 12(2). This is intended to refer to ladies whom the customs of the country do not permit to appear in public. The greatest care should be taken by the Courts in requiring the production of *purdanasheen* ladies, as besides, that they have acquired from the customs of their country a prejudice against appearing in public, they have from passing their lives in seclusion become timid, and it is in many cases cruel to force them to appear in a Court of justice or before any public officer. There is a good deal of difference in these customs. Some ladies may be satisfied by being allowed to veil their countenances; others may be willing to appear in palanquins, while others would feel outraged by having to make any appearance before a Court or public officer, and might reasonably require the Judge, either himself to go, or to send a Commissioner, to interview them, and that with a door intervening, at their own residences. In their anxiety to avoid doing anything, which may interfere with the customs of the country, Judges may occasionally be misled, and may give privileges to women, who by conduct or position, are not entitled to them. This is, however, the safest error, and except when it is clear that a woman is entitled to no privilege a Judge would give a ready ear to any claim to such privilege.

[2] Act VIII of 1890, sec. 12 (3) (*a*).

[3] *Ibid*, sec. 12 (3) (*b*).

[4] *i.e.*, the Court which made the order.

[5] This does not empower the Court to make a prospective order that the delinquent shall be fined a certain sum each day until production of the person of the minor. Each day's fine must be imposed after each day's offence. See *In the matter of Sagar Dutt*, 1 B. L. R. Or. Cr., 41; *In the matter of Love*, 9 B. L. R., App., 35; *In the matter of the Chairman of the Municipal Commissioners of the Suburbs of Calcutta* v. *Aneesooddeen Meah*, 12 B. L. R., App., 2.

detention in the civil jail, until he undertakes to produce the minor or cause him to be produced.[1] If a person who has been released from jail on giving such undertaking fails to carry out the undertaking within the time allowed by the Court, the Court may cause him to be rearrested and recommitted to the civil jail.[2] An order imposing a fine, or imprisonment, is appealable to the High Court.[3]

Procedure at hearing.

On the day fixed for the hearing of the application, or as soon afterwards as may be, the Court shall hear such evidence as may be adduced in support of, or in opposition to, the application.[4] Besides the hearing of evidence the procedure before, at, and after the hearing of the application must, as far as may be applicable, be in accordance with the Code of Civil Procedure.[5]

Report by Collector or Subordinate Court.

As to the power of the Court to call for, and act upon a report by the Collector or a Subordinate Court, *see* Act VIII of 1890, sec. 46, *post*, chap. XIII.[6]

Who may appear on the application.

The Act is silent as to what persons should be allowed to be heard in opposition to the application. This question must be determined in each case by the Court. It is in the interest of minors that any relative, who is *bonâ fide* contesting the application, should be heard.[7]

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[1] Act VIII of 1890, sec. 45.

[2] *Ibid.* In that case there seems no limit to the imprisonment. The Court would probably keep the person in jail until the minor is produced, or until the person confined satisfies the Court that the minor is not under his control.

[3] Act VIII of 1890, sec. 47.

[4] *Ibid*, sec. 13.

[5] Act XIV of 1882, sec. 647. This would include discovery before the hearing, proceedings in execution, etc. The proceeding is not intended to be a summary one: *Shahu* v. *Hapija*, I. L. R., 17 Bom., 560.

[6] Although it may have called for and obtained a report, the Court must give the parties an opportunity of being heard, and adducing evidence. A report does not absolve the Court from the duty of satisfying itself that the proposed guardian is fit and suitable: *Hyder Reza* v. *Collector of Purneah*, 22 W. R. C. R., 490.

[7] *Chakrapani* v. *Varahalamma*, I. L. R., 8 Mad., 227. It was held under Act XL of 1858 in *Kistokishore Roy* v. *Issur Chunder Roy*, 15 W. R. C. R., 166, that only persons themselves claiming to be appointed guardians have any *locus standi* to oppose an application for a certificate; but it is clearly the right, if not the duty, of all those interested in the minor's welfare to see that a proper person be appointed to administer his property or have charge of his person. An outsider, as for instance a creditor of the estate, has no right to appear, *Meltoon* v. *Gibbon*, 12 W. R. C. R., 101.

Only *bonâ fide* application or opposition should be entertained.

Neither an application nor an opposition to an application should be entertained unless it be *bonâ fide*, and solely in the interests of the minor. The Court should not allow an application to be made with an indirect object, as for instance, to obtain the Court's opinion with regard to a contested title to property. In the same way, an opposition, which is for an indirect purpose, as for instance, for that of disputing the minor's right to property, should not be entertained.[1]

Simultaneous proceedings in different Courts.

If proceedings for the appointment or declaration of a guardian of a minor are taken in more Courts than one, each of those Courts shall, on being apprised of the proceedings in the other Court or Courts, stay the proceedings before itself.

If the Courts are both or all subordinate to the same High Court, they shall report the case to the High Court, and the High Court shall determine in which of the Courts the proceedings shall be had. In any other case the Courts shall report the case through the Local Government to the Governor-General in Council, and the Governor-General in Council shall determine in which of the Courts the proceedings shall be had.[2]

Power to make order as to guardianship.

Where the Court is satisfied that it is for the welfare of the minor that an order should be made appointing a guardian of his person or property, or both, or declaring a person to be such a guardian, the Court may make an order accordingly.[3]

Such order implies the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.[4]

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[1] See *Puroma Soonduree* v. *Tara Soondaree*, 9 W. R. C. R., 343.

[2] Act VIII of 1890, sec. 14.

[3] *Ibid*, sec. 7 (1). The Court must satisfy itself as to the fitness of the guardian before making the order; *Ram Dyal Gooye* v. *Amritlall Khamaroo*, 9 W. R. C. R., 555. See Act VIII of 1890, sec. 17, *post*, p. 98. If a suit be pending which will enable the Court to take upon itself the management of the property, it is unnecessary to appoint a guardian of the property; Dan. Ch. Pr., 6th Edn., p. 1120.

[4] Act VIII, of 1890, sec. 7 (2).

Where a guardian has been appointed by will or other instrument,[1] or appointed or declared by the Court, an order appointing or declaring another person to be guardian in his stead can not be made until the powers of the guardian appointed or declared have ceased.[2]

Charge made over to Court of Wards in Bengal.

In Bengal whenever a Civil Court is satisfied that an order should be made, appointing a guardian of the person or property of a minor or both, and whenever a Civil Court removes the guardian of a minor,[3] if the property of such minor consists in whole or in part, of land or any interest in land, the Civil Court may[4] apply to the Court of Wards[5] to take charge of the person and property of such minor, but it is in the discretion of the Court of Wards to take charge of such person or property or to refuse to do so.[6]

Collector to ascertain extent of estate.

Immediately on receipt of such application the Collector must ascertain by any available means what is the extent and character of the property in question, and its financial position as regards income, debts, &c., and submit the application of the Civil Court to the Commissioner of the Division with his report.[7]

Procedure when Collector reports favourably.

If, on such summary enquiry as the Collector can make, it should appear that there is a fair reasonable probability of the property being managed with success, and extricated from any liabilities to which it may be subject, the Commissioner should recommend to the Court that they

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[1] *Ante* chap. ix.

[2] *Ibid*, sec. 7 (3), *post*, p. 97. See sec. 39, *post*, chap. xii, and sec. 41, *post*, chaps. xvi and xviii.

[3] Act VIII of 1890, sec. 39, *post*, chap. xii.

[4] The Court is not compelled to make such application. It may do so, if it thinks fit, see *In the matter of Boevey*, I. L. R., 4 Bom. 635.

[5] Collectors may receive for transmission to the Commissioners, and to the Court of Wards any such applications referring to the property or person of a minor who is resident, or any part of whose property is situated, within their respective districts. Court of Wards Rules, sec. I, Rule 8 (*a*).

[6] Act IX (B. C.) of 1879, sec. 10, as amended by Act IV of 189', sec. 6. When an application is made under this section, the Judge should send the application under cover to the Collector or Deputy Commissioner, as the case may be, for transmission to the Court of Wards Civil Rules and Orders of High Court of Bengal, p. 58, Rule 44.

[7] Court of Wards Rules, sec. I, Rule 9.

accept charge of the property; but if the property is so embarrassed that its extrication within a reasonable time seems hopeless, it is useless to accept the charge.[1]

Whenever the Court of Wards accepts charge it shall issue orders to that effect under Bengal Act IX of 1879, which will then apply to estates thus made over by the Civil Court.[2]

Withdrawal from charge by Court of Wards.

The Court of Wards may at any time withdraw from the charge of any person and property taken at the instance of a Civil Court, and from the charge of any person or property, placed under the charge of the Collector by a Civil Court under sec. 12, 14 or 21 of Act XL of 1858,[3] or under any other enactment for the time being in force: Provided that it shall give notice of its intention to withdraw to the Civil Court concerned, and that such notice shall be given not less than two months before the Court of Wards shall so withdraw.[4]

Appointment or declaration of several guardians.

If the law to which the minor is subject admits of his having two or more joint guardians of his person or property, or both, the Court may, if it thinks fit, appoint or declare them.[5] It cannot make separate appointments to run concurrently.[6]

On the death of a father, being an European British subject, who has, by will or other instrument to take effect on his death, appointed a guardian of his minor child, the Court may appoint the mother to be guardian of the child jointly with the guardian appointed by the father.[7]

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[1] Court of Wards Rules, sec. I, Rule 10.

[2] See Act IX (B. C.) of 1879, secs.5, and 35, *post*, chap. xxxi; Court of Wards Rules, sec. x, Rule 1.

[3] Sections 12, 14 and 15 of Act XL of 1858, and so much of sec. 21 of Act XL of 1858, as provided that the Civil Court might direct the Collector to take charge of an estate, were repealed by Act IX (B. C.) of 1879, sec. 2.

[4] Act IX (B. C.) of 1879, sec. 12.

[5] Act VIII of 1890, sec. 15 (1). As to survivorship, see sec. 38. Where several persons are jointly entitled under a will or deed to the guardianship they may be all appointed: see *Rajessuree* v. *Jogendronath Roy*, 23 W. R. C. R., 278.

[6] *Sham Manna* v. *Ramdyal Gookoo*, 1 W. R., M. A., 3.

[7] Act VIII of 1890, sec. 15 (2), see *ante*, p. 73.

On the death of a mother, being an European British subject, who, during the incapacity of the father of her minor child has, by will or other instrument to take effect on her death, appointed a guardian of the child, the Court may, if the father becomes capable of acting, appoint him to be sole guardian of the child or guardian of the child jointly with the guardian appointed by the mother, as it thinks fit.[1]

Separate guardians may be appointed or declared of the person and of the property of a minor.[2]

If a minor has several properties, the Court may, if it thinks fit, appoint or declare a separate guardian for any one or more of the properties.[3]

Guardian not to be appointed by the Court in certain cases.

The Court cannot[4] appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards,[5] or appoint or declare a guardian of the person—

(*a*) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person,[6] or,

(*b*) subject to the provisions of the Act with respect to European British subjects,[7] of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor,[8] or

[1] Act VIII of 1890, sec. 15 (3).

[2] *Ibid*, sec. 15 (4).

[3] *Ibid*, sec. 15 (5), see *post*, p. 104, note 6. A guardian may be appointed of a portion only of the minor's property.

[4] Act VIII of 1890, sec. 19.

[5] If the property of the minor has not been taken under the superintendence of a Court of Wards, or has been discharged from such superintendence the Civil Court may appoint a guardian of either the person or property of a minor whose estate is liable to be taken under the superintendence of the Court of Wards. The Court of Wards, however, on taking over the superintendence may disregard the order of the Civil Court, *post*, chap. xxx.

[6] A Mahomedan husband, who under Mahomedan law (*ante*, p. 65) is not entitled to the custody of his minor wife might be considered unfit.

[7] Act VIII of 1890, sec. 17, *ante* p. 66.

[8] See *ante*, chap. x, as to what is unfitness. A difficulty arises in the case of children the guardianship of whom is not entrusted by Mahomedan law to the father. Is it intended by this section to supersede the rights of the mother, and female relations? Probably not.

(*c*) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.[1]

Unfitness of father.

The Act does not shew what circumstances should guide the Court in determining whether a father is unfit to be guardian; but it is submitted that the causes which involve a loss of the father's right,[2] and also those which would justify the removal of a testamentary guardian or of a guardian appointed by the Court[3] would be grounds for excluding the father. The Court would also pass over a father, who expressed his willingness that another person should be appointed guardian by the Court.[4]

Guardianship of property by father.

It is to be noticed that the Act does not give the father any superior rights to the guardianship of the property of his children, and except that his nearness of kin must be considered[5] he is entitled to no preference in the competition for the guardianship of property.[6]

Where testamentary guardian or guardians appointed by Court.

The Court cannot[7] appoint another person guardian in the place of a guardian who has been appointed by will or other instrument,[8] or who has been appointed or declared by the Court, unless such guardian is dead or has been removed by the Court for any of the causes mentioned in sec. 39 of the Act,[9] or has been discharged by the Court at his own request.[10]

Dispute as to testamentary appointment.

Where questions arise as to the factum or construction of the instrument creating the appointment, the Court

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[1] *Ante*, p. 96, note 5.

[2] *Ante*, pp. 77 and 78.

[3] See Act VIII of 1890, sec. 39, *post*, chap. xii.

[4] *Oomrao Doollaee* v. *Aga Meer*, 12 W. R. C. R., 119.

[5] Act VIII of 1890, sec. 17 (2), *post*, p. 99.

[6] See *Etwari* v. *Ramnarayan Ram*, 4 B. L. R., App., 71; 13 W. R. C. R., 230.

[7] Act VIII of 1890, sec. 7. The Court is only restricted so far as property upon which a valid appointment operates is concerned. As to the appointment of testamentary guardians, see *ante*, chap. ix.

[8] A verbal appointment or the expression of the wishes of the parent otherwise than by will does not oust the jurisdiction of the Court. It is, however, to be considered, *see* Act VIII of 1890, sec. 17 (2), *post*, p. 99.

[9] *Post*, chap. xii. See Act VIII of 1890, sec. 41.

[10] See Act VIII of 1890, sec. 40.

must accept the determination of any competent Court on the question.[1] Should the question not have been determined, then the Court may have itself to determine the question for the purpose of the application,[2] or in cases where the interests of the minor are not prejudiced by the delay may await the decision of a Probate or other competent Court.[3]

Where there is only a question as to the construction of the document, the Court which hears the application must determine the question, unless it has been previously decided by a competent Court.[4]

Matters to be considered by the Court in appointing guardian.

In appointing or declaring the guardian of a minor, the Court shall, subject to the following provisions be guided by what, consistently with the law to which the minor is subject,[5] appears in the circumstances to be for the welfare of the minor.[6]

In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex[7] and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin[8] to the minor,

[1] As for instance probate of the will, Act I of 1872, secs. 40 and 41; *Jogesh Chunder Chakracarti* v. *Umatara*, 2 C. L. R., 577, see *ante*, p. 73.

[2] Such decision will not operate as *res judicata* in a probate proceeding under the same will; *Chinnasami* v. *Hariharabadra*, I. L. R., 16 Mad., 380. It was held in *Shaku* v. *Hapija*, I. L. R., 17 Bom., 560, that when a person alleges that he has been appointed guardian of a minor under a will, no one else can be appointed guardian under sec. 7 (3) of Act VIII of 1890 until it is found after due investigation that there is no valid will. Should not the ordinary rule, that the person who alleges a fact must prove it, apply here? See Act I of 1872, secs. 101, 102 and 103.

[3] This course may sometimes in the absence of urgency be the fairer to the parties, as the enquiry in the application for the appointment of a guardian is frequently more perfunctory than the hearing of a probate suit, and may prejudice the parties in the trial of more important questions.

[4] Act I of 1872, secs. 40 and 41.

[5] The right of guardianship according to that law, and any matters which under the law to which the minor is subject would exclude a person, otherwise entitled, from the guardianship (see *ante*, chaps. viii and x) may be considered. The welfare of the minor is the main consideration, but his welfare must be considered from the standpoint of his race and religion.

[6] Act VIII of 1890, sec. 17 (1), see *ante*, p. 56 note 1.

[7] See *post*, p. 101.

[8] So far as the management of the property is concerned, the

the wishes, if any, of a deceased parent,[1] and any existing or previous relations of the proposed guardian with the minor or his property.[2]

If the minor is old enough to form an intelligent preference, the Court may consider that preference.[3]

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character and capacity of the guardian is a matter of greater importance than propinquity of relationship; but, in the event of the guardians proposed being of equal fitness, nearness of kin is the matter of next importance: see *Sohna* v. *Khalak Singh*, I. L. R., 13 All., 78; *Imam Baksh* v. *Thacko*, I. L. R., 9 Calc., 599; *Akima* v. *Azeem Sarang*, 9 W. R. C. R., 334; *Khoodeemonee* v. *Kylash Chunder Ghose*, 4 W. R. M. A., 22; *Aman Khan* v. *Hoseena Khatoon*, 9 W. R. C. R., 548; *Fuggoo* v. *Ranah*, 4 W. R. M. A., 3.; and *Mahomed Saleh* v. *The Government*, W. R. 1864, M. R., 26, decided under Act XL of 1858. Nearness of kin is of greater importance in appointing a guardian of the person than of the property. Each case must be governed by its own circumstances, and much is left to the discretion of the Judge; but the Judge cannot, on bare suspicion, assume that a relative proposed as guardian will defraud a minor (*Mahomed Saleh* v. *Government*, W.R. 1864, M. R., 26; *Kolonas*, 16 Ben. S. D. A., 369); and the mere fact of a near relative being a *purdahnasheen* does not disentitle her (*Kurruppool* v. *Collector of Shahabad*, 20 W. R. C. R., 432; *Kolonas*, 16 Ben S. D. A., 309; see *Aman Khan* v. *Hoseena*, 9 W. R. C. R., 548). In every case, the Court must consider the well-being of the minor, and of his estate; and in appointing a guardian of his person, must look to his moral, bodily and intellectual welfare. In one case (*Jugodamba* v. *Mircha*, 17 W. R. C. R., 269), where two near relatives were fighting to get hold of the property, and the probability was that the minor would suffer if the property remained in the hands of either, the Court was held to be right in declaring that neither was a fit person. In appointing a guardian of the minor's property care must be taken to avoid appointing a person who has an interest adverse to that of the minor. "Nearness of kin" does not necessarily refer only to the natural guardian of the minor and the persons entitled to succeed to his property.

[1] However expressed, in writing or by word of mouth or by conduct.

[2] Act VIII of 1890, sec. 17 (2).

[3] Act VIII of 1890, sec. 17 (3). There have been in England and in India a great many cases in which the question whether any and what effect should be given to a minor's own wishes has been discussed. Those cases have generally arisen in the exercise of the summary power possessed by the Courts, but for present purposes that circumstance gives rise to no distinction. In the Indian cases the contest has generally been between parents and Christian Missionaries, and the Courts in India have expressed varying opinions on the question. In Bengal Wells, J., in the *matter of Himnauth Bose*, 1 Hyde, 111, declined to give any effect to the wishes of a Hindu lad of the age of between 15 and 16 years as against the rights of his father. This is a doubtful case, as the boy had completed his 15th year, and therefore, had attained the age of majority according to the Bengal school of Hindu law to which he was subject (*ante*, p. 2)

As between parents who are European British subjects adversely claiming the guardianship of the person, neither parent is entitled to it as of right, but, other things being equal, if the minor is a male of tender years or a female, the minor should be given to the mother, and if the minor is a male of an age to require education and preparation for labour and business, then to the father.[1]

The Court cannot appoint or declare any person to be a guardian against his will.[2]

(see *Queen* v. *Vaughan*, 5 B. L. R., 418). In a Bombay case Sir Joseph Arnould declined to follow Wells, J.'s decision (Mayne's Commentaries on the Indian Penal Code, Notes to sec. 361). The Bombay Supreme Court declined to allow a Hindu lad of the age of 12 to exercise any discretion in *Queen* v. *Nesbitt*, Perry's Oriental Cases, 103 (see also *Queen* v. *Fletcher*, Perry's Oriental Cases, 109), but in the Calcutta case cited in Perry's Oriental Cases, p. 107, note, a boy about 14 years of age was allowed to exercise his discretion, and in Madras a girl of the age of 14 was allowed to exercise her discretion, and against the wish of her father was allowed to remain with her lover; *King* v. *Urilla*, 2 Strange's Notes of Cases 88. See also *in the matter of Saithri*, I. L. R., 16 Bom., 307. In *Reade* v. *Krishna*, I. L. R., 9 Mad., 391, the Court in a suit held that it would give no effect to the views of the minor, though it might have done so in a summary proceeding. See also *in the matter of Culloomurain Swamy*, Mayne's Indian Penal Code, Note to sec. 361. In two Allahabad cases, *Saratchandra Chakarbarti* v. *Forman*, I. L. R., 12 All., 213; and *Jwala* v. *Pirbhu*, I. L. R., 14 All., 35, effect was given to the wishes of a minor. In England both in *habeas corpus* proceedings, and in the appointment of guardians, the wishes of a minor of sufficient age and intelligence to exercise a choice, are consulted. The Indian authorities are not now of importance, as the question is set at rest by sec. 17 (3) of Act VIII of 1890. By that section, the age of the minor, and not the intelligence, is the matter of primary consideration. This is the English law: *Queen* v. *Howes*, 2 El. & B., 332; 30 L. J. M. C., 47. The next question is at what age the Court should listen to the wishes of a minor. The Guardian and Wards Act has fixed none, but by applying to India principles which have guided English Courts, the Courts would decline to listen to the wishes of a male minor under 16, or of a female minor under 14, as the Indian Penal Code (Act XLV of 1860, sec. 361) has taken away from minors under those ages any liberty of choice with regard to the custody of their persons. See *in the matter of Saithri*, I. L. R., 16 Bom. at p. 316; *Queen* v. *Howes*, 2 El. & B., 332; 30 L. J. M. C., 47; *Mallinson* v. *Mallinson*, L. R., 1 P. & D., 221; *In re Agar Ellis*, 24 Ch. D., 326; *In re Andrews*, L. R., 8 Q. B., 153. The wishes of the child would be more likely to be considered in a case when the father is dead than when he is alive and seeking the custody.

[1] Act VIII of 1890, sec. 17 (4). See *ante*, p. 66.

[2] Act VIII of 1890, sec. 17 (5). *Babaji* v. *Maruti*, I. L. R., 5 Bom.

Custody of female.

Under the old law[1] no person other than a female could be appointed guardian of the person of a female, but now there is nothing to prevent a male being appointed guardian of the person of a female.[2]

Person appointed must be resident in jurisdiction.

As ceasing to reside within the local limits of the jurisdiction of the Court is a ground for removing a guardian,[3] it follows that the Court will not appoint as guardian a person residing outside of such limits; but a person resident within the jurisdiction may be appointed guardian *pro tanto* to receive and remit the money allowed for the minor's maintenance.[4]

Recognition of foreign guardian.

In appointing a guardian of a minor, who happens to be in British India, but is the subject of a foreign State, the Court will take into consideration the laws of that State, and may, although it is not obliged to do so, recognise the rights of a guardian legally appointed by the law of that State.[5]

Can only appoint individuals.

The Court can only appoint individuals as guardians. It cannot appoint the members of a firm as such,[6] nor can it appoint a company or an institution or a Court[7] as guardians.

Disqualifications for guardianship.

Persons who are incompetent to act as guardians,[8] cannot be appointed as such by the Court. Similarly those persons, who by improper conduct or otherwise have lost their rights as natural guardians,[9] or whose conduct is such that, if they had been appointed, the Court would have removed them,[10] ought not to be appointed.

310; 11 Bom. H. C. Rep., 182; *Jadow Mulji* v. *Chhagan Raichand*, I. L. R., 5 Bom., 306.

[1] Act XL of 1858, sec. 27; Act XX of 1864, sec. 31. See *Bhoocha* v. *Elahi Bux*, I. L. R., 11 Calc., 574; *Fuseehun* v. *Kajo*, I. L. R., 10 Calc., 15.

[2] The Court in determining who is to be appointed guardian of a female must consider whether in the particular case a female is not the more suitable guardian. *See* Act VIII of 1890, sec. 17 (2), *ante*, p. 98.

[3] Act VIII of 1890, sec. 39, *post*, p. 110.

[4] *Coverdale* v. *Greenway*, Bignell, 11.

[5] *Nugent* v. *Vetzera*, L. R., 2 Eq., 704; *Maganbhai Purshotam Das* v. *Vithoba*, 7 Bom. H. C. R., A. C., 7; Story's Conflict of Laws, §§ 504 and 504*a*.

[6] See *De Mazar* v. *Pybus*, 4 Ves. Jun., 644.

[7] *Roeshun Jehan* v. *Collector of Purneah*, 14 W. R. C. R., 295.

[8] *Ante*, p. 55.

[9] *Ante*, chap. x.

[10] See Act VIII of 1890, sec. 39, *post*, chap. xii.

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Officer of Court appointed guardian.

Where there is no relative or friend suitable for the trust, and willing to undertake it, the Court can appoint one of its officers to be guardian of a minor's property.[1]

Appointment or declaration of Collector in virtue of office.

When a Collector is appointed or declared by the Court in virtue of his office to be guardian of the person or property, or both, of a minor, the order appointing or declaring him authorises and requires the person for the time being holding the office to act as guardian of the minor with respect to his person or property, or both, as the case may be.[2]

Duty of Collector in Bengal on appointment.

In Bengal when a Collector is appointed guardian he must[3] submit through the Commissioner a copy of the Civil Court's order together with a complete report and scheme for the proposed management of the property.[4]

Guardianship of share in joint family property.

Under Acts XL of 1858 and XX of 1864[5] it was decided in several cases[6] that the Court could not give a certificate unless the minor possessed property, of which separate charge could be taken, and which could be separately managed; that where he was a member of a joint Hindu family no such certificate could be given; and that the proper remedy for those who, with a view to his welfare, wished to secure for him the full fruition of his rights in

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[1] When the Receiver of the High Court of Bengal is appointed guardian, he must pass his accounts half yearly. Belchambers's Rules and Orders, Rule 19.

[2] Act VIII of 1890, sec. 18. In Bombay no Subordinate Judge or Court of Small Causes can receive or register a suit in which the Collector as guardian is a party; Act XIV of 1869, sec. 32; *Narsingrav Ramchandra* v. *Luxumanrav*, I. L. R., 1 Bom., 318.

[3] Court of Wards' Rules, sec. X, Rule 7.

[4] As required by Rules 1 and 3, sec. III, of the Court of Wards' Rules, *post*, chapter xxxi.

[5] Repealed by Act VIII of 1890.

[6] *Goberdhun* v. *Girwur*, 3 Agra H. C. Rep. 92; *Sheonundun Singh* v. *Ghunsam Kooeree*, 21 W. R. C. R., 143; *Ajhola Kooeree* v. *Digumbur Singh*, 23 W. R. C. R., 206; *Ruder Perkash Misser* v. *Hurdai Narain Sahu*, 5 C. L. R., 112; *Goorah Koeri* v. *Gujadhur Persad*, I. L. R., 5 Calc., 219; 4 C.L.R., 398; *Hoolash Koeer* v. *Kassee Proshad*, I. L.R., 7 Calc., 369; *Shivji Hasam* v. *Dadu Mavji*, 12 Bom. H. C. R., 281; *Garacharya* v. *Seamiraya Charya*, I. L. R., 3 Bom. 431; *Narsingrav Ramchandra* v. *Venkaji Krishna*, I. L. R., 8 Bom., 395, and cases cited in *Virappakshappa* v. *Nilyangava*, I. L. R., 19 Bom., 309; *contrâ*, *Dhiraj* v. *Ajoodya Bux Singh*, 3 N.-W. P. H. C. Rep, 91; see *Babaji* v. *Sheshgiri*, I. L. R., 6 Bom., 593.

the joint family property was to apply to the other members of the family for a partition, and, if that application failed, to a competent Court for the same purpose.[1] Under the Guardians and Wards Act, 1890, a guardian cannot, according to the decisions, be appointed to take charge of the share of a minor who is a member of a joint Hindu family governed by the Mitakshara law,[2] and possessed of no separate property, although there is nothing to prevent a guardian of his person being appointed.[3] The decisions depend to some extent upon the question as to what effect is to be given to the opinion of their Lordships of the Privy Council in the case of *Durgapersad* v. *Keshopersad Singh*.[4] In Calcutta,[5] and in two Bombay cases,[6] it has been held that the Privy Council did not decide this question; but in another Bombay case[7] the High Court held that the Privy Council seemed to decide that a certificate could be granted. It appears from the judgment of the Privy Council, that it was taken for granted that a certificate could be given to a co-sharer.[8]

Even if the Guardians and Wards Act be held to permit the appointment, it would be highly undesirable in most cases to allow the introduction of strangers into the affairs of joint families.[9] It may sometimes be for the interest of a minor, and not prejudicial to the interests

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[1] See *post*, chap. xviii.

[2] *Shamkuar* v. *Mohanunda Sahoy*, I. L. R., 19 Calc., 301; *Virupakshappa* v. *Nilgangava*, I. L. R., 19 Bom., 309; *Jhabbu Singh* v. *Ganga Bishan*, I. L. R., 17 All., 529.

[3] *Virupakshappa* v. *Nilgangava*, I. L. R., 19 Bom., 309.

[4] I. L. R., 8 Calc., 656; L. R., 9 I. A., 27.

[5] *Shamkuar* v. *Mohanunda Sahoy*, I. L. R., 19 Calc., 301.

[6] *Narsingrav Ramchandra* v. *Venkajikrishna*, I. L. R., 8 Bom., 395; *Virupakshappa* v. *Nilgangava*, I. L. R., 19 Bom., 309.

[7] *Babaji* v. *Sheshgiri*, I. L. R., 6 Bom. 593.

[8] A similar assumption was made in *Etwari* v. *RamnarayanRam*, 4 B.L. R. App. 71; 13 W. R. C. R., 230.

[9] See remarks in *Kalidas Ravidat* v. *Pranshankhar Jibhai*, Bombay P. J., 1884, p. 8, approved of in *Narsingrav Ramchandra* v. *Venkajikrishna*, I. L. R., 8 Bom., 335. *Cf.* Act IV of 1892, sec. 2, by which the Legislature excludes from the operation of the Court of Wards Act 1879 undivided shares held in coparcenary as the property of a Hindu joint family governed by the Mitakshara or Mithila law.

of the family, that a guardian should be appointed for a special purpose.[1]

Where all the persons interested in joint property are minors, a guardian or guardians of the property may be appointed.

Appeal from orders under sec. 7.

An appeal lies to the High Court from an order made by a District Court, appointing or declaring or refusing to appoint or declare a guardian.[2]

Questions of title to property.

In making an order for the appointment of a guardian, the Court has no power to determine any question with reference to the title of the minor, or of any other person, to any property,[3] and the Court should avoid expressing any opinion on the subject, as it might thereby be prejudging questions in which persons not parties to the application are interested.

Effect of order on property.

An order appointing a guardian has no effect upon the rights of other persons in property held by the minor,[4] nor does it confer upon the guardian any rights except over property actually belonging to the minor.[5] It merely constitutes him, for certain purposes, a trustee for the minor, and gives him certain powers over the minor's person and property.

Specification of property in order.

Where it is necessary, the order appointing a guardian, may specify the property entrusted to his charge, but, except in exceptional cases, it is undesirable to do so.[6]

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[1] As in the case of *Jairam Luxmon*, I. L. R., 16 Bom., 634, where it was desired to obtain the sanction of the Court to a proposed mortgage. This was an application to the High Court for the exercise of its powers under its Charter (see *post* chap. xiv), but the same principle would be applicable to a case under the Guardians and Wards Act.

[2] Act VIII of 1890, sec. 47.

[3] *Brohmomoyee* v. *Chitturmonee*, 8 W. R. C. R., 25.

[4] See *Gurupadaca* v. *Patapa*, I. L. R., 8 Bom., 599.

[5] See *Rasoonnissa* v. *Khajoorunnissa*, 10 W. R. C. R., 462.

[6] It was held under Act XL of 1858 that the certificate must not specify the property in respect of which it is granted; *Fedu Hossein* v. *Khajoorunnissa*, 9 W. R. C. R., 459; see also *Sheo Prosunno Chobey* v. *Gopal Surn*, 15 W. R. C. R., 529; and *Collector of Tirhoot* v. *Deonundun Singh*, 10 W. R. C. R., 318; but now in the case where the whole of the property is not given in charge of a single guardian (see Act VIII of 1890, sec. 15 (5)), *ante*, p. 96, and in

In making the order the Court can restrict the powers of a guardian of either the person or property, but it cannot therein enlarge the powers given to him by law.

Appointment or declaration of guardian for property beyond jurisdiction of the Court.

If the Court appoints or declares a guardian for any property situate beyond the local limits of its jurisdiction, the Court having jurisdiction in the place where the property is situate shall, on production of a certified copy of the order appointing or declaring the guardian, accept him as duly appointed or declared, and give effect to the order.[1] Where a guardian has been appointed by a competent Court, no other District Court can appoint a guardian.

Remuneration of guardian.

A guardian appointed or declared by the Court is entitled to such allowance, if any, as the Court thinks fit for his care and pains in the execution of his duties.[2]

Fees to Government.

When an officer of the Government, as such officer, is so appointed or declared to be guardian, such fees shall be paid to the Government out of the property of the ward as the Local Government, by general or special order, directs.[3]

Where a guardian of the property of a ward has been appointed or declared by the Court and such guardian is not the Collector, he shall,[4]—

Bond by guardian.

(*a*) if so required by the Court, give a bond, as nearly as may be in the prescribed form, to the Judge of the Court to enure for the benefit of the Judge for the time being, with

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some other special cases, it may become necessary to specify the property. Where the property is specified, care should be taken, if possible, to avoid inviting litigation by describing as belonging to the minor property claimed by others. Where property is claimed on behalf of more than one minor it would be more than usually undesirable to specify the property, as the Court could not appoint rival administrators of the same property.

[1] Act VIII of 1890, sec. 16.

[2] Act VIII of 1890, sec. 22 (1).

[3] Act VIII of 1890, sec. 22 (2). At page 668 of the Calcutta Gazette of the 8th July 1891, it is notified that in this case the same fees shall be payable to the Government as are chargeable to estates managed by the Court of Wards, namely, the general management rate, the treasury rate, the audit fees, and the Legal Remembrancer's fee.

[4] Act VIII of 1890, sec. 34. As to the penalty for breach of these obligations, see sec. 45, *post*, p. 106.

or without sureties,[1] as may be prescribed, engaging duly to account for what he may receive in respect of the property of the ward ;[2]

Statement of assets and liabilities.

(*b*) if so required by the Court, deliver to the Court, within six months from the date of his appointment or declaration by the Court or within such other time as the Court directs, a statement of the immoveable property belonging to the ward, of the money and other moveable property which he has received on behalf of the ward up to the date of delivering the statement, and of the debts due on that date to or from the ward ;

Accounts.

(*c*) if so required by the Court, exhibit his accounts in the Court at such times and in such form as the Court from time to time directs ;

Payment of balance.

(*d*) if so required by the Court, pay into the Court at such time as the Court directs the balance due from him on those accounts, or so much thereof as the Court directs.

Penalty for neglect of obligation.

If he fails to deliver the required statement within the time allowed, or to exhibit the required accounts, or to pay into the Court the balance due from him on those accounts in compliance with a requisition, such guardian is liable, by order of the Court,[3] to fine not exceeding one hundred rupees, and in case of recusancy to further fine not exceeding ten rupees for each day[4] after the first during which the default continues, and not exceeding five hundred rupees in the aggregate, and to detention in the civil jail until he undertakes to deliver the statement or to exhibit the accounts, or to pay the balance,

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[1] Except it be for the interest of the minor, a surety cannot be discharged. He may be able to apply to the Court for protection against the guardian ; *Somi* v. *Chokshi Ishwardas Mangaldas*, I. L. R., 19 Bom., 245.

[2] As to the remedy on the bond, see Act VIII of 1890, secs. 35 and 36, *post*, chap. xix.

[3] *i.e.*, the Court which made the order.

[4] See *ante*, p. 91, note 5.

as the case may be.[1] If a person who has been released from detention on giving such undertaking fails to carry out the undertaking within the time allowed by the Court, the Court may cause him to be arrested and re-committed to the civil jail.[2] An order imposing a fine or imprisonment is appealable to the High Court.[3]

Children of remarried Hindu widows.

As to the appointment of guardians of children of remarried Hindu widows, see Act XV of 1856, section 3, *ante*, p. 80.[4]

Suit for appointment of guardian.

There being nothing in the Guardians and Wards Act, or in any other enactment to exclude their jurisdiction, the Courts in the districts can probably appoint guardians in suits brought for that purpose.[5] In consequence of the existence of a special procedure such suits have fallen into disuse, and if they be brought the Courts would probably, as far as possible, apply to them, the principles and procedure to be found in the Guardians and Wards Act.

The Indian Divorce Act.

The Indian Divorce Act[6] gives to the Court, trying a suit instituted under that Act, power before decree, in its decree, or after decree, upon application by petition to provide for the custody, maintenance, and education of minor children,[7] the marriage of whose parents is the

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[1] Act VIII of 1890, sec. 45.

[2] *Ibid*; see *ante*, p. 92, note 2.

[3] Act VIII of 1890, sec. 47.

[4] Although the power to apply under that Act has not been taken away, there is nothing to prevent an application under Act VIII of 1890 for the appointment of a guardian of the children of a remarried Hindu widow. In appointing a guardian, a Court would probably follow the special rules laid down in sec. 3 of Act XV of 1856, *ante*, pp. 80 and 81.

[5] See Act XIV of 1882, sec. 11. A suit cannot be brought to set aside an order passed under the Guardians and Wards Act (VIII of 1890, sec. 48). For a recent instance of an appointment by decree, see *Bai Harkor* v. *Bai Shangar*, I. L. R., 18 Bom., 375.

[6] Act IX of 1869, secs. 41—44. As to the practice in applications for custody under the Indian Divorce Act see *Ledlie* v. *Ledlie*, I. L. R., 18 Calc. 473.

[7] "Minor children" means, in the case of sons of native fathers, boys who have not completed the age of sixteen years, and in the case of daughters of native fathers, girls who have not completed the age of thirteen years. In other cases it means unmarried children who have not completed the age of eighteen years; see sec. 5 of the Act. See *Thomasset* v. *Thomasset*, [1894] P. D. 295; *Webster* v. *Webster*, 31 L. J. P. M. & A., 184.

subject of the suit and to direct proceedings to be taken for placing such children under the protection of the Court. The Court has the fullest discretion,[1] but where the father is found to be in fault, the Court ordinarily interferes with his legal right, and gives the custody to the mother if she be free from blame.[2] The benefit of the children is the matter to be considered. In making an order, the Court can permit the parent to whom the custody is not given to have periodical access to the children.[3]

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[1] See per Cairns L. C. in *Symington* v. *Symington*, L. R. 2 H. L. Sc. App. at p. 420. *Handley*, v. *Handley*, [1891] P. D. 124.

[2] *Macleod* v. *Macleod*, 6 B. L. R., 318.

[3] See *Thompson* v. *Thompson*, 31 L. J. P. M. and A., 213 ; 2 Sw. and Tr. 402 ; *D'Alton* v. *D'Alton*, 4 P. D. 87. The Court will not ordinarily give access to a mother in consequence of whose adultery the marriage has been dissolved ; *Handley* v. *Handley*, [1891] P. D. 124.

CHAPTER XII.

Removal and Discharge of Guardians by Civil Court.

Removal of guardian.

The District Court[1] may,[2] on the application of any person interested,[3] or of its own motion, remove a guardian appointed or declared by the Court,[4] or a guardian appointed by will or other instrument,[5] for any of the following causes, namely :—

(*a*) for abuse of his trust ;[6]

(*b*) for continued failure to perform the duties of his trust ;

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[1] See Act VIII of 1890, sec. 4 (4) and (5) *ante*, p. 86, note 1.

[2] Act VIII of 1890, sec. 39.

[3] This expression would not permit an application by a person seeking to remove a guardian for his own purposes, and against the interests of the ward.

[4] This includes guardians appointed under the Acts repealed by Act VIII of 1890 ; Act VIII of 1890, sec. 51.

[5] This does not include a decree. *Bai Harkor* v. *Bai Shangar*, I. L. R., 18 Bom., 375.

[6] Releasing without adequate consideration a mortgage in the minor's favour, and lending the minor's money without security (*Tusneef Hossein* v. *Sookhoo*, 14 W. R. C. R., 453) ; withdrawing without any sufficient cause or justification, and without legal advice, an appeal made to set aside a sale of the minor's estate, and at the same time dealing with the auction-purchaser and obtaining a putnee of that very property in the name of his own wife (*Pitamber Dey Mozoomdar* v. *Ishan Chunder Dutt Bisicas*, 18 W. R. C. R, 169) ; were held to be sufficient causes for the removal of a certificate-holder ; and where the certificate-holder was guilty of gross negligence, if not of fraud, in wasting the property of the minor by allowing portions to be sold for arrears, and debts of very small amounts, when there was an ample fund in hand to have prevented the sales, his certificate was recalled ; *Goonomonee* v. *Bhubo Soondaree*, 18 W. R. C. R., 258. Such breaches of duty as would involve the loss of the right of guardianship in the case of a natural guardian (see *ante*, chap. x) would also justify the removal of a guardian appointed by the Court,

(*c*) for incapacity to perform the duties of his trust ;[1]

(*d*) for ill-treatment, or neglect to take proper care of his ward ;

(*e*) for contumacious disregard of any provision of Act VIII of 1890 or of any order of the Court ;[2]

(*f*) for conviction of an offence implying, in the opinion of the Court, a defect of character which unfits him to be the guardian of his ward ;

(*g*) for having an interest adverse to the faithful performance of his duties ;

(*h*) for ceasing to reside within the local limits of the jurisdiction of the Court ;

(*i*) in the case of a guardian of the property, for bankruptcy or insolvency ;

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[1] This would include not only physical and mental, but also moral incapacity. A guardian of the person, who has contracted vicious habits, which might contaminate the ward, would be liable to be removed, see cases *ante*, p. 77, note 1. A mere change of religion would not justify the removal of the guardian (see *ante*, p. 82, Act XXI of 1850, *Machoo* v. *Arzoon Sahoo*, 5 W. R. C. R., 235, and Simpson on the Law of Infants, 2nd Edition, 131) ; but should he thereby become incompetent to provide for the education of his wards in the religion in which they ought to be brought up (see *post*, chapter xxii), his removal would be justified. The loss of all religious principle would, as in the case of a father (see *ante*, p. 77), justify the removal of a guardian. The remarriage of a Mahomedan mother or other causes which, under the personal law of the minor, might incapacitate a natural guardian would not justify the removal of a testamentary guardian or of a guardian appointed by the Court unless those causes render them incapable of doing their duty to their wards ; see *Mohomuldy* v. *Omdutoonissa*, 13 W. R. C. R., 454. The remarriage of a Hindu widow who is not a testamentary guardian may be on a different footing, as the Legislature has (see *ante*, p. 80) provided for the appointment of a guardian in her place in that event. A guardian confined in jail would be incapable of performing the duties of his trust. Where two guardians are quarrelling and are not acting together for the interests of the minor, they can be removed ; *Nistarinee* v. *Collector of 24-Pergunnahs*, 23 W. R. C. R., 230.

[2] The fact that a guardian has executed a bond without the previous sanction of the Court, is not, if he acted in good faith, and without any intention of injuring the interests of the minor, a ground for removing him, though it would be otherwise where he has acted in bad faith ; *Brijendronarain Roy* v. *Bussuntcoomar Ghose*, 13 W. R. C. R., 300 ; s. c., *In the matter of Bussuntcoomar Ghose*, 15 B. L. R., note to p. 351.

(*j*) by reason of the guardianship of the guardian ceasing or being liable to cease, under the law to which the minor is subject:

Provided that a guardian appointed by will or other instrument, whether he has been declared under Act VIII of 1890 or not, shall not be removed—

(*a*) for the cause mentioned in clause (*g*) unless the adverse interest accrued after the death of the person who appointed him, or it is shown that that person made and maintained the appointment in ignorance of the existence of the adverse interest, or

(*b*) for the cause mentioned in clause (*h*) unless such guardian has taken up such a residence as, in the opinion of the Court, renders it impracticable for him to discharge the functions of guardian.

Removal on above grounds alone.

A guardian appointed or declared by the Court or a testamentary guardian can only be removed on the above grounds.[1] He cannot be removed on the ground that another person would better perform the duties of a guardian,[2] or on the ground that on further consideration the Court would not have appointed him.[3] The causes for his removal would ordinarily only be acted upon when they have arisen subsequently to the order of appointment; but where new and important evidence, which, after the exercise of due diligence, was not within the knowledge of the person opposing the appointment or could not be produced by him at the time of the order, has been discovered, or there be any other sufficient reason, an application may be made for a review of the order.[4]

Trustees cannot be removed under the Act.

Except in the case of an appointment of guardian by the father or by the mother (where the law permits

[1] See *Jugodumba* v. *Mircha*, 17 W. R. C. R., 269.

[2] *Mudhoosoodun Singh* v. *Collector of Midnapore*, 1 Marsh., 244; 2 Hay, 113.

[3] *Deorani Koer* v. *Parusman Narain*, 12 C. L. R., 546.

[4] Act XIV of 1882, secs. 623 and 647.

it),[1] the Court has no power under the Guardians and Wards Act to remove persons whose rights to the charge of the property are created by the instrument under which the minor takes the property. They are removable only under the circumstances which justify the removal of ordinary trustees.

Judicial enquiry before order made.

An order for the removal of a guardian can only be made after a judicial enquiry,[3] held on due notice to the person sought to be removed and after such person has had an opportunity of being heard and calling evidence on his behalf. The order must be based upon legal evidence[3] of the facts which would justify the removal of the guardian.[4]

Taking of accounts before removal unnecessary.

It is not necessary that the accounts of the guardian should be taken in a suit under sec. 35 or sec. 36 of the Guardians and Wards Act[5] before an application is made to the Court for his removal,[6] although it may happen that the charges made against him cannot be disposed of without the accounts being investigated. In some cases, where the charges against the guardian involve the taking of complicated accounts, it may be convenient to allow or require the application to stand over until the determination of a suit.[7]

Temporary injunction and receiver.

Pending the hearing of the application for removal the Court can in a proper case restrain the guardian from intermeddling with the property of his ward,[8] or may appoint a receiver to take charge of such property.[9]

Removal of natural guardians.

Section 39 of the Guardians and Wards Act[10] has no application to natural guardians, as, except that no one

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[1] *Ante*, p. 72.

[2] *Sakharat Ally* v. *Noorjehan*, I. L. R., 10 Calc., 429.

[3] This would include a report made under Act VIII of 1890, sec. 46, see *post*, chap. xiii.

[4] *Ante*, pp. 109 to 111.

[5] VIII of 1890, *post*, chap. xix.

[6] *In the matter of Shurwar Hossein Khan*, B. L. R. F. B. R., 721; s. c. *Nannee* v. *Surwar Hossein*, 7. W. R. C. R., 523, and 2 Ind. Jur. N.S., 200. See *Madhoosoodun Singh* v. *Collector of Midnapore*, Marsh. 244, 2 Hay, 113.

[7] This of course should not be done if the interests of the minor are likely to be in the least prejudiced thereby.

[8] Act XIV of 1882, secs. 492 and 647. See also Act VIII of 1890, sec. 43 (1).

[9] Act XIV of 1882, secs. 503 & 647.

[10] Act VIII of 1890, *ante*, p. 109.

can be appointed guardian of the person when the father or husband is not unfit,[1] an order for their removal is unnecessary, and they can at any time be superseded on an order being made on an application for the appointment of a guardian. Where a natural guardian is abusing his trust or otherwise shewing himself unfit to act as guardian, any friend of the minor may apply for the appointment of a guardian.[2]

Discharge of guardian.

If a guardian appointed or declared by the Court desires to resign his office, he may apply to the Court to be discharged.[3] If the Court finds that there is sufficient reason for the application, it shall discharge him, and, if the guardian making the application is the Collector and the Local Government approves of his applying to be discharged, the Court shall in any case discharge him.[4]

Although a guardian is not entitled as of right to be discharged,[5] the fact that he is unwilling to act, may be a ground for removing him at the instance of a friend of the minor.[6]

Appointment of successor to guardian dead, discharged or removed.

When a guardian appointed or declared by the Court is discharged, or, under the law to which the ward is subject, ceases to be entitled to act, or when any such guardian or a guardian appointed by will or other instrument is removed or dies, the Court, of its own motion or on an application[7] may, if the ward is still a minor, appoint or declare another guardian of his person or property, or both, as the case may be.[8]

The same restrictions apply, and the same matters have to be considered, in the appointment of a guardian in the

[1] Act VIII of 1890, sec. 19, *ante*, p. 96.

[2] Act VIII of 1890, sec. 8, *ante*, p. 84. In case of necessity an order can be made for the temporary custody of the minor or his property. Act VIII of 1890, sec. 12, *ante*, p. 90.

[3] Act VIII of 1890, sec. 40 (1).

[4] *Ibid*, sec. 40 (2).

[5] See *Kalee Pershad Singh* v. *Poorno*, 15 W. R. C. R., 398.

[6] Act VIII of 1890, sec. 39 (*b*) & (*c*) *ante*, pp. 109 and 110.

[7] *Ante*, p. 84.

[8] Act VIII of 1890, sec. 42. The Court should at once appoint a new guardian. In the absence of such fresh appointment, the powers of a natural guardian would apparently revive; not so the rights of a testamentary guardian as he must have been removed before the appointment can have been made.

place of one dead, discharged or removed as in the case of an original appointment.[1]

Charge by Court of Wards on removal of guardian.

A Civil Court in Bengal, which removes a guardian, can apply to the Court of Wards to take charge of the property of the minor when a part thereof consists of land or any interest in land.[2]

Order to make over property on removal or discharge.

As in the other cases, when the powers of a guardian cease, the Court may require a guardian, who has been removed or discharged, to deliver, as it directs, any property in his possession or control belonging to the ward, or any accounts in his possession or control relating to any past or present property of the ward.[3]

When he has delivered the property or accounts as required by the Court, the Court may declare him to be discharged from his liabilities save as regards any fraud which may subsequently be discovered.[4]

Appeal.

There is an appeal to the High Court from an order removing a guardian[5] and from an order refusing to discharge a guardian.[6]

Other remedies besides removal.

As to the remedies which, in addition to the removal of the guardian, are open to a minor, or those who represent him, against a guardian appointed by the Court or by a deed or will, see *post*, Chapter XIX.

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[1] *Ante*, pp. 98 to 102.

[2] Act IX (B. C.) of 1879, sec. 10, as amended by Act IV of 1892, sec. 6, *ante*, p. 94. On the Court of Wards accepting charge the provisions of Act IX (B.C.) of 1879 apply, *ante*, p. 95, see *post*, chaps. xxxi, xxxii, xxxiii.

[3] Act VIII of 1890, sec. 41 (3), *post*, chap. xix. An order under this section operates as a proceeding in execution of the order of removal, see *Sunraj Kuari* v. *Ambika Prasad Singh*, I. L. R., 6 All., 144. As to the penalty for disobedience of an order under this section, see Act VIII of 1890, sec. 45 (1) *c*, *post*, chap. xix.

[4] Act VIII of 1890, sec. 41 (2) *post*, chap. xix. Under Acts XL of 1858, sec. 23, and XX of 1864, sec. 23, the Court could only discharge the guardian on his accounting to his successor for all moneys received, and disbursed by him, and making over the property in his hands; see *Kalee Pershad Singh* v. *Poorno*, 15 W. R. C. R., 398.

[5] Act VIII of 1890, sec. 47 (*g*). There is no appeal when the Court refuses to remove the guardian: *Mohima Chunder Biswas* v. *Tarini Sunker Ghose*, I. L. R., 19 Calc., 487; *Pakhwanti Dai* v. *Indra Narain Singh*, I. L. R., 23 Calc., 201; *In re Bai Harkha*, I. L. R., 20 Bom., 667. As to appeals in proceedings under Act VIII of 1890, see *post*, chap. xiii.

[6] Act VIII of 1890, sec. 47 (*h*). There is no appeal from an order discharging a guardian.

CHAPTER XIII.

REFERENCES, APPEALS, COSTS, ETC., IN PROCEEDINGS UNDER GUARDIANS AND WARDS ACT.

Reports by Collector and Subordinate Courts.

THE Court may[1] call upon the Collector, or upon any Court subordinate to the Court, for a report on any matter arising in any proceeding under the Guardians and Wards Act and treat the report as evidence.

For the purpose of preparing the report the Collector or the Judge of the subordinate Court, as the case may be, shall make such inquiry as he deems necessary, and may for the purposes of the inquiry exercise any power of compelling the attendance of a witness to give evidence or produce a document which is conferred on a Court by the Code of Civil Procedure.[2]

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[1] Act VIII of 1890, sec. 46 (1). Although it may have received a report the Court is bound (see sec. 13, *ante*, p. 92) to give the parties an opportunity of being heard, and of adducing relevant evidence. While giving due weight to the opinion of the Collector or Court making the report, it is often necessary to see upon what material such report is based, and to act upon it only where it is based on legal evidence, and where the parties have had an opportunity of placing their view of the matter before the Collector or Court making a report. A report is evidence, but not necessarily of a higher class than other evidence which may be produced. The fact that it has received a report does not absolve the Court from the duty of satisfying itself that the order ought to be made or refused, as the case may be; *Hyder Reza* v. *Collector of Purneah*, 22 W. R. C. R., 490. It is generally desirable to require the party excepting to a report to formulate his objections, so that the Court can properly deal with the report by way of appeal. The Court has no power to act upon a report made by a ministerial officer or any person other than a Collector or Court subordinate to the Court, except in cases where a local investigation is necessary or accounts have to be adjusted (see Act XIV 1882, secs. 393 and 394).

[2] Act VIII of 1890, sec. 46 (2).

Orders appealable.

An appeal lies[1] to the High Court[2] from an order made by a District Court,—

(*a*) under sec. 7, appointing or declaring or refusing to appoint or declare a guardian[3]; or,

(*b*) under sec. 9, sub-sec. (3), returning an application[4]; or,

(*c*) under sec. 25, making or refusing to make an order for the return of a ward to the custody of his guardian;[5] or,

(*d*) under sec. 26, refusing leave for the removal of a ward from the limits of the jurisdiction of the Court, or imposing conditions with respect thereto;[6] or,

(*e*) under sec. 28 or sec. 29, refusing permission to a guardian to do an act referred to in the section;[7] or,

(*f*) under sec. 32, defining, restricting or extending the powers of a guardian;[8] or,

(*g*) under sec. 39,[9] removing a guardian; or

(*h*) under sec. 40, refusing to discharge a guardian;[10] or,

(*i*) under sec. 43, regulating the conduct or proceedings of a guardian or settling a matter in difference between joint guardians, or enforcing the order;[11] or,

(*j*) under sec. 44[12] or sec. 45, imposing a penalty.[13]

Persons entitled to appeal.

Persons, who are properly parties to the proceedings, and are injuriously affected by any of the orders referred to, are entitled to appeal.[14]

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[1] Act VIII of 1890, sec. 47.

[2] As to appeals from orders made by the Governor's Agent in Ganjam and Vizagapatam, see *Chakrapani* v. *Varahalamma*, I. L. R., 18 Mad., 227.

[3] *Ante*, p. 104.

[4] *Ante*, p. 86.

[5] *Post*, chap. xx.

[6] *Post*, chap. xvi.

[7] *Post*, chap. xvii.

[8] *Post*, chaps. xvii and xviii.

[9] *Ante*, p. 114.

[10] *Ibid.*

[11] *Post*, chap. xviii.

[12] *Post*, chap. xvi.

[13] *Ante*, p. 92.

[14] See *Muhamdee* v. *Nazirun*, I. L. R., 6 Calc., 19; 6 C. L. R., 210; *Meltbon* v. *Gibbon*, 12 W. R. C. R., 101.

Appeal from order on original side of High Court.

There is an appeal in the High Court itself from an order made by a single Judge under the Guardians and Wards Act provided such order be a judgment [1] within the meaning of sec. 15 of the Letters Patent of 1865 of the High Courts of Bengal, Madras and Bombay. This right of appeal is not limited to the cases mentioned in sec. 47 of the Guardians and Wards Act,[2] and it may be exercised by any person who was properly a party to the proceedings and who is injuriously affected by the order.

Stay of execution pending appeal.

For sufficient cause,[3] the execution of any appealable order made under the Guardians and Wards Act may be stayed, pending appeal.[4]

Appeal to Her Majesty in Council.

As orders under the Guardians and Wards Act do not bear an appealable value, there is no further appeal to Her Majesty in Council.[5]

Appeal from Burmah.

For similar reasons an appeal will not lie from Burmah to the High Court of Bengal.[6]

Finality of orders.

Except so far as a right of appeal is given or an order is liable to be set aside under sec. 622[7] of the Code of

[1] *i.e.*, it must be a decision, whether final, or preliminary, or interlocutory, which affects the merits of the question between the parties by determining some right or liability; *Justices of the Peace for Calcutta* v. *Oriental Gas Company*, 8 B. L. R., 433; *Kristokissor Neoghy* v. *Kadermoye*, 2 C. L. R., 583; *Mohabir Prosad Singh* v. *Adhikari Kunwar*, I. L. R., 21 Calc., 473; *In the matter of Narrondas Dhanji*, I. L. R., 14 Bom., 555.

[2] *Ante*, p. 116.

[3] It must be shewn that there may be injury to the child or its property by the order being executed, and the Court may require to be satisfied that the appeal is a *bonâ fide* one and has a reasonable chance of success.

[4] See secs. 545 and 546 of the Code of Civil Procedure (Act XIV of 1882).

[5] *Pearee Daye* v. *Hurbuns Kooer*, 14 W. R. C. R., 299; and see High Court Letters Patent, 1865, cl. 39. Special leave to appeal can be given by the Privy Council, see *In the matter of Skinner*, 13 Moo. I. A., 532.

[6] *In re Mulla Adjim*, I. L. R., 14 Calc., 351.

[7] Act XIV of 1882, sec. 622, is as follows:

"The High Court may call for the record of any case in which no appeal lies to the High Court, if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity; and may pass such order in the case as the High Court thinks fit." See *Chakrapani* v. *Varuhalamma*, I. L. R., 18 Mad., 227, where the High Court set aside an order made by the Agent to the Governor in the Vizagapatam District.

Civil Procedure, an order made under the Guardians and Wards Act is final, and cannot be contested by suit or otherwise.[1]

Costs.

The costs of any proceeding under the Guardians and Wards Act, including the costs of maintaining a guardian or other person in the civil jail are, subject to any rules made by the High Court under that Act, in the discretion of the Court in which the proceeding is had.[2]

Power of High Court to make rules.

The 50th section of the Guardians and Wards Act is as follows: "(1) In addition to any other power to make rules conferred expressly or impliedly by this Act, the High Court may from time to time make rules consistent with this Act—

(*a*) as to the matters respecting which, and the time at which, reports should be called for from Collectors and subordinate Courts;

(*b*) as to the allowances to be granted to, and the security to be required from, guardians, and the cases in which such allowances should be granted;

(*c*) as to the procedure to be followed with respect to applications of guardians for permission to do acts referred to in secs. 28 and 29;

(*d*) as to the circumstances in which such requisitions as are mentioned in cls. (*a*), (*b*), (*c*) and (*d*) of sec. 34 should be made;

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[1] Act VIII of 1890, sec. 48. This would not exclude a right to apply for a review (see *ante*, p. 111), or to set aside an order on the ground of fraud, and it would not preclude a fresh application (see *Nekalo* v. *Nawal*, I. L. R., 1 All., 428), except where the matters in question in the subsequent application are the same as those determined in the earlier one.

[2] Act VIII of 1890, sec. 49. *Cf.* Act XIV of 1882, secs. 218 to 222. Where the Court has made no order a suit will not lie for the costs of proceedings under the Act; *Kabir* v. *Mahadu*, I. L. R., 2 Bom., 360. The Court may either require the applicant or the opposing party to pay costs. In some cases it may permit costs to be paid out of the minor's estate. Except where the application or opposition is made for indirect motives, it is ordinarily undesirable to make the parties pay costs personally, as thereby others might be deterred from maintaining the causes of minors.

(*e*) as to the preservation of statements and accounts delivered and exhibited by guardians;

(*f*) as to the inspection of those statements and accounts by persons interested;

(*g*) as to the custody of money, and securities for money, belonging to wards;

(*h*) as to the securities on which money belonging to wards may be invested;

(*i*) as to the education of wards for whom guardians, not being Collectors, have been appointed or declared by the Court; and,

(*j*) generally, for the guidance of the Courts in carrying out the purposes of this Act.

(2) Rules under cls. (*a*) and (*i*) of sub-sec. (1) shall not have effect until they have been approved by the Local Government, nor shall any rule under this section have effect until it has been published in the official Gazette."

Applicability of Act to guardians already appointed by Court.

Persons holding certificates or having been appointed guardians under earlier Acts are subject to the provisions of the Guardians and Wards Act, and of the rules made under it in the same way as if they had been appointed guardians under that Act.[1]

[1] Act VIII of 1890, sec. 51. This is the case only where they were actually guardians at the time the Act came into force: *Vallabdas Hirachand* v. *Krishnabai*, I. L. R., 17 Bom., 566.

CHAPTER XIV.

APPOINTMENT AND REMOVAL OF GUARDIANS BY HIGH COURTS.

Powers under Guardians and Wards Act.

As we have seen,[1] the High Courts of Bengal, Bombay, and Madras, can exercise the powers given to District Courts by the Guardians and Wards Act,[2] and can appoint under that Act[3] guardians of the persons or property of minors, who ordinarily reside within the limits of their ordinary Original Civil Jurisdiction, and in the case of minors not so residing, can appoint guardians of their property if thay have any property within such limits.

Powers of High Courts under their Charters.

The Guardians and Wards Act reserved the powers which the High Courts possessed apart from that Act.[4]

By its Charter of 1774, the Supreme Court of Bengal was empowered[5] to appoint guardians and keepers for infants and their estates, according to the order and course observed in England.

Bengal.

By its Letters Patent of 1862[6] and 1865,[7] the High Court of Bengal possesses the like power and authority with respect to the persons and estates of infants within

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[1] *Ante*, p. 86, note 1. As to the procedure to be followed in applications under the Guardians and Wards Act, see *ante*, chaps. xi to xiii.

[2] Act VIII of 1890.

[3] Sec. 9, *ante*, p. 86.

[4] Act VIII of 1890, sec. 3. See *Jairam Luxmon*, I. L. R., 16 Bom., 634. An applicant can, at his option, apply for the exercise of the powers conferred by the Guardians and Wards Act or of those conferred by the several Charters, or he can apply in both jurisdictions. In practice, it can rarely make much difference under which jurisdiction he applies. A High Court cannot by appointing a guardian under the powers given to it by its Charter interfere with the powers of a guardian who has been appointed by a competent Court in the Province.

[5] Cl. 25.

[6] Cl. 16.

[7] Cl. 17.

the Bengal Division of the Presidency of Fort William, as was vested in the Supreme Court at the date of the establishment of the High Court.

Bombay.

The High Court of Bombay possesses similar powers by the combined operation of cl. 17 of the amended Letters Patent of 1865, and of cl. 16 of the Letters Patent of 1862.[1]

Madras.

The High Court of Madras also possesses similar powers.

North-Western Provinces.

The 12th clause of the Charter of the High Court of the North-Western Provinces, gives to that Court the same powers with respect to the powers and estates of minors within the North-Western Provinces as that which was exercised in Bengal by the High Court of Bengal.

To what minors these powers extend.

These powers extend to all minors, being European British subjects,[2] who reside within the provinces over which these High Courts have respectively jurisdiction,[3] but would, so far as the appointment of guardians of their persons is concerned, include only the non-European British subjects, who reside within the limits of the ordinary Original Civil Jurisdiction of the High Courts.[4]

In addition to the special powers of appointing guardians given to the High Courts by their Charters, the High Courts of Bengal, Madras, and Bombay can, in exercise of their powers as Courts of Original Jurisdiction, appoint and remove guardians, provide for the maintenance of minors,[5] the management and disposition of their property,[6] and their marriage.[7]

Powers are independent of possession of property.

The powers of the High Courts to appoint guardians of the persons of minors, do not depend upon the possession

[1] See *In the matter of Saithri*, I. L. R., 16 Bom., 322.

[2] As to the meaning of the term "European British subjects," see *ante*, p. 66, note 2.

[3] See *Shannon*, 2 N.-W. P. H. C. Rep., 79. In the case of such minor residing outside the Province the Court could appoint a guardian of property situate within the Province.

[4] See *In the matter of Srish Chunder Singh*, I. L. R., 21 Calc., 206. There is no reason why the Court should not appoint a guardian of property situate within its jurisdiction.

[5] *Post*, chap. xxii.

[6] *Post*, chap. xxiv.

[7] See *post*, chap. xxiii.

of property by such minors;[1] but where a minor is possessed of no property, the Court cannot frame a scheme for his maintenance or education.[2]

Petition without suit.

The High Courts, acting under the powers contained in their Charters, can appoint guardians on petition without a suit being filed.[3] Such petition without suit has not been considered sufficient in the case of the minor's property being large, and there being difficulties in the administration of his property, or in the care of his person,[4] or in the case of his legal guardians being guilty of misconduct, and it being desirable that they should be superseded or controlled.[5] It is submitted that now the Court would rarely, if ever, require a suit to be filed, as the objection that the appointment shall not be made without a suit would not be an answer to an application under the Guardians and Wards Act, and the Court would not, therefore, permit such objection to stand in the way of a similar application for similar relief under another jurisdiction.[6]

Petition in suit.

Suit.

An appointment can also be made on a petition in a pending suit in which the minor's property is being administered, and it can be made by a decree in a suit instituted for the purpose of the appointment.

Procedure.

For the sake of uniformity, a High Court in exercising its jurisdiction under its Charter will, so far as possible, adopt the procedure laid down in the Guardians and Wards Act,[7] but it is in no way bound thereby and can accept or reject any portion thereof.

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[1] *Re Jagannath Ramji*, I. L. R., 19 Bom., 96; *Barnardo* v. *McHugh* [1891], A. C., 388; *In re McGrath* [1893], 1 Ch. 143.

[2] *In re McGrath* [1893], 1 Ch., 143.

[3] *In the matter of Bittan*, I. L. R., 2 Calc., 357; *Jairam Luxmon*, I.L.R., 16 Bom., 634; *Jagannath Ramji*, I. L. R., 19 Bom., 97.

[4] See *In the matter of Srish Chunder Singh*, I. L. R., 21 Calc., 206.

[5] Simpson on Infants, 2nd Edn., 242.

[6] As pointed out by Sale, J., *In the matter of Srish Chunder Singh*, I. L. R., 21 Calc., 206, the Court in acting under the powers given to it by its Charter will follow, as far as possible, the principles and procedure laid down in the Guardians and Wards Act (VIII of 1890).

[7] VIII of 1890, *ante*, chaps. xi and xii; *In the matter of Srish Chunder Singh*, I. L. R., 21 Calc., 206.

Contents of petition.

The matters required by sec. 10 of the Guardians and Wards Act[1] to be inserted in petitions under that Act are, so far as they relate to applications for the appointment of guardians, necessary to be stated in petitions presented to a High Court for the appointment of a guardian.[2]

Former practice as to inquiry.

The practice of the Supreme Court of Bengal was to require the master to report as to what person should be appointed guardian of the minor, and the master in his report was required to state the age of the minor, the nature and amount of his property, what relations he had by the father's or mother's side, the degree of relationship between the proposed guardian and the minor, and the grounds upon which he approved or disapproved of any person so applying. Now that the duties of the master are merged in the Court, the appointment may be made on the petition, or the Court may make a reference to one of its officers, or to the Court itself, to enquire who is a proper person to be appointed guardian.[3]

Service of petition.

There is no rule as to the class of persons upon whom the petition should be served. The rule of the Court of Chancery is, that the summons, which answers in this respect to the petition to a High Court, should be served upon all the persons who stand within the same degree of relationship to the minor as the proposed guardians, unless their acquiescence in the appointment of the proposed guardian be otherwise proved or service on them is dispensed with.[4] A High Court would now ordinarily require the petition to be served in the manner and on the persons mentioned in sec. 11 of the Guardians and Wards Act.[5]

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[1] *Ante*, p. 87.

[2] Under the practice of the Supreme Court of Bengal, applying to the High Court of Bengal, the petition for the appointment of a guardian of the person or estate of a minor was required to state the age of the minor, the nature and amount of his property, what relations he has on the father's and mother's side, and the degree of relationship between the proposed guardian and the minor. Smoult and Ryan's Rules and Orders, p. 130.

[3] See *In the matter of Bittan*, I. L. R., 2 Calc., 357.

[4] Daniell's Chancery Practice, 5th Edn., p. 1195.

[5] *Ante*, p. 89.

Evidence required.

In addition to evidence of the facts, which must be stated in the petition, evidence is required of the fitness of the proposed guardian, and his willingness to act should be proved by the production of his written consent.[1]

Receiver.

A High Court can appoint a receiver to take charge of the property of a minor pending the hearing of an application for the appointment or discharge of a guardian.[2]

Except in a case which it could deal with under its summary powers,[3] the Court cannot make an interlocutory order for the custody of the minor, as in the case of a petition under the Guardians and Wards Act.[4]

Jurisdiction over property within the province.

Provided there be some property within the limits of its original jurisdiction a High Court can, either under the Guardians and Wards Act,[5] or under the powers which it possesses apart from that Act, appoint a guardian of all the property of the minor being within the Province over which that Court has jurisdiction. Except in the case where for indirect motives, and not for the benefit of the minor, the application is made to a High Court, which of the High Courts having jurisdiction would be the least able to exercise its jurisdiction to the advantage of the minor, it is submitted that an appointment by one High Court would be recognized by other High Courts at any rate to the extent of showing a *primâ facie* right to the appointment.

Guardianship of property within jurisdiction of more than one High Court.

Principles of appointment and removal.

In appointing and removing guardians the High Courts follow the principles, which guide the Chancery Division of the High Court in England so far as they are applicable to this country, *i.e.*, paying due regard to the rights of parents, testamentary guardians, and other persons who by the personal law, to which the minor is subject, are entitled to guardianship, the Court will appoint

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[1] See *ante*, pp. 88 & 100. Daniell's Chancery Practice, 5th Edn., p. 1195.

[2] See Act XIV of 1882, secs. 503 and 647.

[3] *Post*, chap. xx.

[4] VIII of 1890, sec. 12 (1), *ante*, p. 90.

[5] *Ante*, p. 86.

such persons as are by character, capacity, and relationship most fitted for the trust, and the Court will remove such guardians as have shown themselves unfit for the trust, or whom in the interests of their wards it is necessary or desirable to remove.[1]

In some cases the Court will, instead of removing the existing guardian, and appointing a person to act in his place, make orders regulating the conduct of the guardian,[2] and this is the proper course where the conduct of the guardian, though in some sense blameworthy, has not been sufficiently bad to justify his removal from the trust.

Guardians and Wards Act.

The Guardians and Wards Act[3] has defined the power of parents to appoint guardians in the case of European British subjects, and to this extent only does the Act actually affect the appointment by guardians by High Courts acting otherwise than under the powers given to them by that Act; but the High Courts will avail themselves of the principles contained in that Act.[4]

There is no substantial difference between those principles, and those by which the High Courts were guided before the Guardians and Wards Act was passed.

Although the welfare of the minor is the dominant matter for consideration, the Court would not appoint any one in the place of a testamentary guardian except under circumstances which would justify the removal of that guardian, nor would it interfere with the rights[5] of a natural guardian who is not unfit to be appointed guardian.

Recognition of rights of natural and testamentary guardians.

As the law gives the custody of the persons and property of minors to certain persons[6] in the absence of an appointment by the Court, it may be presumed that ordinarily such persons are the best fitted for the trust,

[1] "The dominant matter for the consideration of the Court is the welfare of the child." *In re McGrath* [1893], 1 Ch., 148.; *Stuart* v. *Bute*, 9 H. L. C., 440.

[2] *Rouch* v. *Garvan*, 1 Ves. Sen., 160.

[3] Act VIII of 1890, sec. 5, *ante*, p. 72.

[4] *In the matter of Srish Chunder Sing*, I. L. R., 21 Calc., 211. *Ante*, pp. 98 to 102.

[5] See *In the matter of Saithri*, I. L. R., 16 Bom., 334.

[6] *Ante*, chaps. viii and ix.

but where they have lost their right[1] or have shown themselves unfit for the trust they would not be appointed.[2]

Removal of guardians.

The causes which justify the removal of a guardian appointed under the Guardians and Wards Act,[3] would equally be grounds for removing a guardian appointed independently of that Act.

Appeals.

There is an appeal from an order of a single Judge appointing or removing a guardian.[4]

Security to be given by guardian.

A High Court may require a person appointed guardian of the estate of a minor to give security for the due performance of his trust;[5] but security will rarely be required from the guardian of the person of a minor.

Salary of guardian.

It may also fix a salary for the guardian and may direct that it be paid out of the minor's estate.[6]

Orders as to care of person and estate.

It can also from time to time limit or extend the powers of the guardian and give directions for the care of the person or the management of the estate of the ward.[7]

Minor how constituted a ward of Court.

When a guardian of the person or estate of a minor has been appointed by a High Court, the minor is said to be a ward of Court, and as such is entitled to the particular care and protection of the Court. Properly speaking, a ward of the Court is a person who is under a guardian appointed by the Court; but whenever a suit is instituted in the Court relative to the person or property of a minor, although he is not under any general guardian appointed by the Court, he is treated as a ward of the Court and as being under its special cognizance and protection.[8]

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[1] *Ante*, chap. x.

[2] Any matter which would justify the removal of an appointed guardian would bar an appointment, see *ante*, p. 101.

[3] Act VIII of 1890, sec. 39, *ante*, pp. 109 and 110.

[4] See *ante*, p. 117, note 1.

[5] See Smoult and Ryan's Rules and Orders, p. 130. Act VIII of 1890, sec. 34, *ante*, p. 105. As to the discharge of a surety, see *ante*, p. 106, note 1.

[6] See Act VIII of 1890, sec. 22, *ante*, p. 105.

[7] See *post*, chap. xxiv.

[8] Story's Equity Jurisprudence, sec. 1352; *Pendleton* v. *Mackrory*, 2 Dick., 736; *Wynn* v. *Gilbard*, 1 Dr. & Sm., 356; *Stuart* v. *Bute*, 9 H. L. C., 440; *Hughes* v. *Science*, Amb., 302. See also Macpherson on Infants, p. 103

An order for the maintenance of a minor would also, it seems, constitute the minor a ward of Court.[1] It would also probably be held that a payment into Court of monies belonging to a minor under the provisions of sec. 46 of the Indian Trustee Act,[2] would constitute such minor a ward of the Court.[3]

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[1] *Re Graham*, L. R., 10 Eq., 530.

[2] XXVII of 1866, *ante*, p. 41.

[3] See cases under the Trustee Relief Act, cited in Simpson on Infants, 2nd Edn., p. 240, note (*t*).

CHAPTER XV.

DUTIES OF GUARDIANS.

General duty of guardian to ward.

THE duty of a guardian towards his ward, whether he be appointed by the Court, or be in any other way entitled to the trust, is to do all that lies in his power to further the interests of his ward and to preserve his property. He has all the responsibilities of a trustee,[1] but is not exonerated by his ward's acquiescence in a breach of trust.[2]

Fiduciary relationship.

He stands in a fiduciary relation to his ward, and except that he is entitled to such salary or remuneration as may be provided by the will or other instrument, if any, by which he was appointed, or which, if he be appointed by a Civil Court[3] or by a Court of Wards,[4] has been allotted to him in pursuance of a statutory power, he must not make any profit out of his office.[5] Should he make such profit he may be required to restore it to his ward, with such damages as the ward may have suffered by his wrong doing.

Must make no profit out of office.

Must obtain no benefit at expense of estate.

He is bound to abstain from entering into any arrangement which benefits him at the expense of the minor's estate ; and if he enters into any such arrangement, it is incumbent on him, immediately after his ward comes of age, to obtain from him, not an accidental, but a distinct formal ratification.[6]

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[1] *Matthews* v. *Brise*, 14 Beav., 345 ; *Beaufort* v. *Berty*, 1 Peere. Wms., 703. See Act VIII of 1890, secs. 20 and 37.

[2] *Wilkinson* v. *Parry*, 4 Russ., 276.

[3] *Ante*, p. 105.

[4] *Post*, chaps. xxxii, xxxiv, & xxxv.

[5] Act VIII of 1890, sec. 20.

[6] *Prosunno Coomar Ghutituck* v. *Woomachurn Mookerjee*, 20 W. R. C. R., 274. As to ratification, see *post*, chap. xxi.

Must not set up adverse title.

A guardian must not, for himself or another, set up or aid any title to the property of his ward, adverse to the interest of the ward.[1]

Accounts.

A guardian is bound to keep clear and accurate accounts,[2] and at reasonable times to give to his ward or to persons properly interested on the wards behalf, full and accurate information as to the amount and state of the property subject to his charge.[3]

Conflicting interests of guardian and ward.

When the interests of the guardian conflict in any way with those of his ward, the guardian is bound to see that the ward is provided with proper and independent advice and assistance.

Transactions between guardian and ward.

The Courts will watch, with the greatest jealousy, a transaction between a guardian and his ward, and before upholding it, will require the clearest proof of good faith and fairness, absence of influence, knowledge by the ward of the facts and of his rights, and benefit to the ward.[4]

Gifts to guardian.

Although a gift by a ward to his guardian would ordinarily be set aside,[5] yet where there is a complete absence of any influence, and where the ward is close on the age of majority, has been acting independently, and has good reasons for being bountiful to his guardian, it may be possible to support the gift.[6]

Setting aside gift or sale by ward to guardian.

Before setting aside a sale or gift by a ward to his guardian, the Court may require the ward to pay back any sum of money which may have been received by him, or which may have been expended for his benefit.[7]

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[1] See Act II of 1882, sec. 14.

[2] See *Barnes* v. *Ross* [1896] A. C., 625.

[3] As to the accounts to be kept by a guardian appointed or declared by a District Court, see Act VIII of 1890, sec. 34, *ante*, p. 106. As to a guardian's liability to a suit for an account, see *post*, chap. xix.

[4] Act VIII of 1890, sec. 20; Act I of 1872, sec. 111, *post*, p. 130. See *Hunter* v. *Atkins*, 3 M. & K., 135, *post*, p. 130, note 3; *Lachmun Dass* v. *Rupchand*, 5 Sel. Rep., 114; 2nd Edn., 136; *Ram Ghose* v. *Kalee Pershad Ghose*, 4 Sel. Rep., 17, 2nd Edn., 22.

[5] *Wood* v. *Downes*, 18 Ves., 127. Under the Hindu law all gifts by minors are void, see Stokes' Hindu Law Books, p. 134.

[6] *Taylor* v. *Johnston*, 19 Ch. D., 603, and cases there cited.

[7] See *post*, chap. xxi.

Transactions between guardian and ward soon after attainment of majority.

This protection which the law affords to minors against the wrongful exercise of the influence of their guardians over them is extended to transactions between them and their guardians after they have attained the age of majority and while that influence still lasts or is recent.[1]

The 111th section of the Indian Evidence Act[2] provides that "where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence." Illustration (*b*) to that section is as follows: "The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father."[3] This rule is equally applicable whether a parent or any other person be guardian.

The Guardians and Wards Act[4] contains the following: "The fiduciary relation of a guardian to his ward extends to, and affects purchases by, the guardian of the property of the ward, and by the ward of the property of the guardian, immediately or soon after the ward has ceased to be a minor, and generally all transactions

[1] Act VIII of 1890, sec. 20 (2).

[2] I of 1872. This rule has no application to those who are not in a fiduciary relation to the person who has recently attained majority. *Rajcoomar Roy* v. *Alfuzuddin Ahmed*, 8 C. L. R., 419.

[3] This section of the Evidence Act is merely an embodiment of the English rule of law, with reference to which Lord Brougham said in *Hunter* v. *Atkins*, 3 M. & K., 135: "There are certain relations known to the law, as attorney, guardian, trustee. If a person standing in these relations to client, ward, or *cestui-que-trust* takes a gift or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, &c., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule rightly considered is, that the person standing in such relation must, before he can take a gift or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage from his relation to the other party beyond what may be the natural and unavoidable consequence of kindness arising out of that relation."

[4] Act VIII of 1890, sec. 20 (2).

between them while the influence of the guardian still lasts or is recent."

Releases by wards soon after attaining majority.

The Courts will look very jealously at releases executed by wards soon after attaining their majority in favour of their late guardians. Where such a release is in question, the burden of proving the good faith of the transaction is on the guardian, and it is for him to show that he has derived no benefit from the transaction, that he has placed his ward in full possession of all the facts and accounts relating to his property, and explained to him the full extent of his rights therein. The circumstances must shew the fullest deliberation on the part of the ward, and perfect good faith on the part of the guardian.[1]

In the case of *Gillon* v. *Mitford*,[2] where a minor had given a release to his guardian soon after coming of age, Sir Thomas Strange said that the principles of equity which govern that species of case "are those which render it the duty of the Court, wherever a man appears to have been acting as guardian, or as trustee in the nature of guardian to a minor, to see, when he comes to give up his trust, that a fair account has been rendered, and that his release, if he have obtained one, has been fair. They operate in other relations besides that of guardian and ward ; and, in their application, are always considered not as ordinary principles regulating rights, and as such liable to be modified by a variety of personal circumstances, but as principles of policy to be enforced for the sake of the public, as affording by their efficacy a salutary and important protection, where protection is peculiarly needed, and without the influence of which great imposition might be practised, and incalculable injustice done. For this reason, their application does not depend upon detection of positive unfairness in the arrangement proposed to be impeached. If it confer an advantage upon the guardian, it may be one that he may have

[1] *Toolsey Doss Ludha* v. *Premji Tricumdass*, I. L. R., 13 Bom., 61. See also *Ramkissen Patjoshee Mahapatur* v. *Hurrykissen Mahapatur*, 15 Ben. S. D. A., 274.

[2] 1 Madras Notes of Cases, 281.

merited; but upon the principles of the Court, it may not be the less bound to set it aside. Neither does it depend upon its appearing whether the minor just come of age knew at the time in its full extent what it was that he was giving up, and was apprized of his option to withhold his consent. In ordinary cases a man will be bound by his release, if there appear to have been a consideration for it, and that, knowing at the time the extent of his rights, he was aware of the nature of the instrument he was about to execute. But I apprehend it is different between a guardian and ward, at the critical moment of settling the account, upon the latter coming of age. At law the relation may have ceased, the minor having become legally *sui juris*. But an influence for the most part on the side of the guardian still continuing, equity presumes its operation, and will not permit him at that moment, in the act of settling the account, to derive an important advantage for which he could not have stipulated; much less if it be more than doubtful whether the ward was informed at the time of the extent to which he was entitled to call him to account, and whether he possessed advice to satisfy the Court that he was not misled in releasing him."

A transaction between a person who has just attained the age of majority and his guardian, or another person standing *in loco parentis* to him, will be set aside even against a third person, if he takes a benefit, knowing the nature of the circumstances; but this would be otherwise, where there is no ground for imputing to him knowledge of undue influence.[1]

Family arrangements.

Where the transaction between a guardian and his ward is of the nature of a family arrangement, as where an estate is resettled in a way advantageous for the family generally, though the ward gives up some of his rights, the Court will not set it aside unless it be clear that the ward had not a reasonable knowledge of what he was

[1] *Archer* v. *Hudson*, 7 Beav., 551.

doing. Transactions of this kind are looked upon with favour by the Court, and the Court will not, as in the case of ordinary releases given by a ward to his guardian, or other transactions between them soon after the ward has attained majority, raise any presumption of undue influence.[1]

Acquiescence and ratification.

As to the effect of acquiescence and ratification on the wards' rights, see *post*, Chap. XXI.

Resignation of guardianship.

A guardian, who has acted as such, cannot arbitrarily resign his trust. A guardian is a trustee,[2] and unless he has been appointed or declared by a Court, and has been discharged by that Court,[3] he cannot be relieved from his trust until he has fully accounted for his dealings with the property of his ward, and until another person has duly taken his place.[4]

Duties of guardian of the person.

The duties of a guardian of a minor's person whether he be a natural or testamentary guardian, or has been appointed by the Court, are summed up by the Guardians and Wards Act[5] as follows :—

"A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health, and education, and such other matters as the law to which the ward is subject requires."

He must make proper provision for the maintenance, lodging, clothing, and education[6] of the ward, according to the position which he will occupy in life on his attainment of the age of majority.[7]

Marriage.

As to the duties of a guardian with reference to the marriage of his ward, see *post*, Chap. XXIII.

Guardians under Courts of Wards.

Subject to such limitations as may be contained in the enactment under which he is appointed, and to such

[1] See Simpson on Infants, 2nd Edn., p. 185; *Hoblyn* v. *Hoblyn*, 41 Ch. D., 200, and cases there referred to.

[2] *Ante*, p. 128.

[3] Act VIII of 1890, sec. 40, *ante*, p. 113. As to his discharge from liability, see sec. 41 (4) *post*, chap. xix.

[4] See *Gourmonee* v. *Bamasoondaree*, 2 Sev. Reps., note to p. 747; 16 Ben. S. D. A. Rep., 532.

[5] Act VIII of 1890, sec. 24.

[6] As to the maintenance and education of minors, see *post*, chap. xxii.

[7] As to the duty of the guardian of the property to provide money for these purposes, see Act VIII of 1890, sec. 34 (*e*), *post*, p. 135.

restrictions as may be imposed by the Court appointing him, a guardian under a Court of Wards has the same duties as any other guardian towards his ward.[1]

Information of birth of children.

As to the duties of parents and others to give information of the birth of children, see—

Bengal Act II of 1888, sec. 185; Madras Act I of 1884 (applying to the city of Madras), secs. 398 and 402; Madras Act IV of 1884 (applying to the District Municipalities of the Madras Presidency), secs. 247 and 248; Bombay Act III of 1888, secs. 445 and 446.

As to the voluntary registration of births, see Act VI of 1886, as amended by Acts XVI of 1890, and II, and XII of 1891.

Vaccination.

The duties of parents and guardians as to the vaccination of children are to be found in Bengal Act V of 1880, as amended by Bengal Acts II of 1887 and II of 1890; Madras Act IV of 1884 (applying to the District Municipalities of the Madras Presidency), secs. 132 to 141; Madras Act V of 1884 (Madras Local Boards Act), secs. 102 to 115; Bombay Act I of 1877 (applying to the city of Bombay), secs. 7 to 13; Bombay Act I of 1892 applying to the Bombay Districts. See also Act XIII of 1880, which applies to (amongst other places) the North-Western Provinces and Assam.

Duties of guardian of estate.

The Guardians and Wards Act declares[2] that a guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own.

His duties can be well described in the terms used in the agreement which has to be executed by managers of estates under the Bengal Court of Wards[3]. He must manage the estate diligently and faithfully for the minor proprietor, must use every means in his power to improve the same for the ward's benefit, and must act in every respect for the interest of such ward in like manner as if the estate were his own.

[1] *Post*, chap. xxx.

[2] Act VIII of 1890, sec. 27.

[3] Rules of Bengal Court of Wards, Appx. O.

The guardian must scrupulously regard the interests of his ward in dealing with the estate. The Court will, when necessary, enforce the performance of this duty.[1]

Maintenance, education, and advancement of ward.

Where a guardian of the property of a minor has been appointed or declared by the Court[2] and such guardian is not the Collector, he must apply for the maintenance, education, and advancement of the ward and of such persons as are dependent on him,[3] and for the celebration of ceremonies to which the ward or any of those persons may be a party, such portion of the income of the property of the ward as the Court from time to time directs, and, if the Court so directs, the whole or any part of that property.[4]

Where a Collector is the guardian, he is bound to make proper provision for the reasonable wants of his ward.

In other cases, where the custody of the minors' property is not in the same hands as the custody of his person, it is the duty of the guardian of the property to supply to the guardian of the person money sufficient for the suitable maintenance, education, and advancement of the ward.

Guardian to acquaint himself with property.

When the office devolves upon him, a guardian should acquaint himself, as soon as possible, with the nature and circumstances of the property of his ward, and should get in all money outstanding or invested on insufficient or hazardous security.

To get in outstandings.

Duty of guardian with respect to suits.

It is often necessary that suits be brought, and other legal proceedings be taken, for the purpose of protecting, preserving, or recovering property belonging to minors.[5] Care should be taken to avoid bringing unnecessary, or ill-advised suits, lest the minor be prejudiced thereby.[6]

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[1] *Lekhraj Roy* v. *Mahtab Chand*, 14 Moo. I. A. at p. 398; 10 B. L. R. at p. 44; 17 W. R. C. R. at p. 118.

[2] This includes a guardian appointed under the Acts which were repealed by Act VIII of 1890. Act VIII of 1890, sec. 51.

[3] Besides those, whom the minor is legally bound to support, *i.e.*, his wife and children, this would include such persons, as it would be, if he were an adult, his duty according to the customs of his family or the dictates of his religion to support.

[4] Act VIII of 1890, sec. 34 (*e*).

[5] As to the procedure in suits on behalf of minors, see *post*, chap. xxv.

[6] The exercise of this caution is also to the interest of the person proposing to institute a suit on behalf of a minor, as he may have to pay the costs of an unsuccessful suit. See Act XIV of 1882, sec. 440, *post*, chap. xxvi.

Caution in bringing them.

Where the interests of the minor will not be prejudiced by delay it is better to defer the suit, so that, on attaining majority, he can exercise his own discretion.

It is the duty of the guardian to bring, or cause to be brought, on behalf of his ward, all suits which are manifestly for his benefit or for that of his estate; and it is also his duty to see that the interests of his ward are properly cared for, and that his ward is properly represented, in all suits, or other proceedings to which he is a party.

If the guardian omits to bring a necessary suit, it may be brought on behalf of the minor by any other next friend.[1]

When the property of the minor has been unlawfully alienated,[2] where his rights are threatened, or where they have been actually assailed, it is generally proper to institute a suit on his behalf. Similarly where he is entitled to recover money by way of damages or otherwise, it is ordinarily undesirable to postpone litigation.

Suit for partition of joint family property.

Where the minor is a member of a joint Hindu family, and his interests are likely to be prejudiced by the property remaining joint, as for instance, where the co-parceners are wasting the property, or setting up rights adverse to the minor, or decline to provide for his maintenance, it is for his interest that a suit[3] for a partition be brought,[4] but if there be no such special circumstances it is ordinarily not in the interest of the minor that such suit should be brought.[5] The same principle would apply

[1] See *post*, chap. xxv.

[2] See *Sheopershad Jha* v. *Gungaram Jha*, 5 W. R. C. R., 221.

[3] *i.e.*, either a suit in a Civil Court, or a proceeding in a Revenue Court.

[4] *Damoodur Misser* v. *Senabutty Misrain*, I. L. R., 8 Calc., 537; 10 C L. R., 401; *Mahadev* v. *Lakshman*, I. L. R., 19 Bom., 99; *Thangam Pillai* v. *Suppa Pillai*, I. L. R., 12 Mad., 401; *Kamakshi Ammal* v. *Chidambara Reddi*, 3 Mad. H. C. R., 94. As to partition by arrangement, see *post*, chap. xviii.

[5] *Damoodur Misser* v. *Senabutty Misrain*, I. L. R., 8 Calc., 537; 10 C. L. R., 401; *Alimelammal* v. *Arunachelam Pillai*, 3 Mad. H. C. R., 69; *Svamiyar Pillai* v. *Chokkalingam Pillai*, 1 Mad. H. C. R., 105; Macnaghten's Hindu Law, vol. ii, p. 14 note; Mayne's Hindu Law, 2nd Ed., p. 536; West & Bühler, 2nd Ed., 304, 396. If the suit be not for the benefit of the minor, the Court will refuse to decree partition. In addition to the objections (*post*, chap. xviii) which there are to a

to reviving on behalf of a minor a suit for partition instituted by his father,[1] provided it be clear that the omission to continue the suit does not prejudice the minor's rights to the property.

Appeals.

Where there has been a decision adverse to the minor, his guardian should prefer an appeal, if he be advised that there is a reasonable chance of success.

Other proceedings.

A guardian should also prosecute all other legal proceedings as may be necessary for the realisation and preservation of his ward's estate. For instance, when the ward's property has been sold for arrears of Government revenue or otherwise, or orders have been passed to its prejudice, the guardian should take all necessary steps for the purpose of setting aside the sale or order.[2]

Must regard interest of estate.

A guardian must have regard to the interest of the inheritance, not the immediate income. Where a minor's estate is encumbered, or there are debts for which his estate would be liable, it is the duty of the guardian to endeavour to pay off such debts by strict economy out of the income of the estate. He should not sell or encumber the estate until he is forced to do so.[3]

Payment of debts due by estate.

The guardian is bound to exercise the discretion of a reasonable and prudent man with respect to the payment of debts. He is not bound to contest them whether they be well or ill-founded,[4] nor is he necessarily accountable for sums paid by him in discharge of debts barred by

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partition of a minor's property, there is also the danger of the minor's property being wasted by the costs of the litigation, and this consideration may turn the scale, when the advantages and disadvantages of a suit are being weighed. A minor cannot resist partition at the instance of an adult.

[1] *Parvathi* v. *Manjaya Karantha*, 5 Mad. H. C. R., 193.

[2] Under the Bengal Survey Act (V (B.C.) of 1875) the omission to appeal from an order does not bar a suit, if the person suing was a minor at the time when such order was passed (see sec. 62); but no similar indulgence is given to a minor in the case of a sale for arrears of revenue under Act XI of 1859, sec. 23.

[3] *Sutton* v. *Jones*, 15 Ves., 588; *Bukshan* v *Maldai*, 3 B. L. R., A. C., 423; s.c., *Bukshun* v. *Doolhin*, 12 W. R. C. R., 337. As to when a guardian may charge or sell the estate of his ward, see *post*, chap. xvii.

[4] *Lekhraj Roy* v. *Mahtab Chand*, 14 Moo. I. A., 399; 10 B. L. R., 44; 17 W. R. C. R., 118.

limitation, where he has found those sums justly due, and is acting honestly.[1]

After all necessary payments, he must accumulate or invest on sound security the income of the minor's property.[2]

Income-tax.

A guardian, or a manager under a Court of Wards,[3] must, out of the income of his ward's property, pay the income-tax chargeable to the ward,[4] and may for that purpose retain so much as is sufficient to pay the amount.[5]

He may also be required to furnish to the proper authorities the name of his ward and the particulars of such of his income as is liable to assessment.[6]

Ancestral trades.

As to his duty with reference to an ancestral trade in which his ward may be interested, see *post*, Chap. XVIII.

Duty to persons other than ward.

The duty of a guardian of the property of a minor towards persons other than his ward is similar to that of any other manager or occupier.

Offences against Salt laws.

In the Madras Presidency a guardian or manager must give immediate information to the officers of the Salt Agent, to the nearest Magistrate, or to the Collector, of any salt that may be made in or imported into the land of which he has charge under pain of a penalty of twenty-five per cent. on the value of salt proved to have been so made or imported with his knowledge or connivance, exclusively of the penalty of confiscation.[7]

Accounts on termination of guardianship.

The guardian must, on the termination of his guardianship, furnish to the guardian appointed in his place, to the ward, if he has attained majority, or to the ward's representative, if the ward be dead, a full account of his dealings with the ward's property and complete information

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[1] *Chowdhry Chuttarsal Singh* v. *Government*, 3 W. R. C. R., 57; *Hurro Chunder Chowdhry* v. *Bungsee Mohun Doss*, 1 W. R. M. A., 16.

[2] As to the guardian's powers of investment, see *post*, chap. xviii. As to the duty of a guardian, appointed or declared by the Court, with regard to the balance, see Act VIII of 1890, sec. 34, *ante*, p. 106.

[3] See Rule 36 of general Rules of Court of Wards of North-Western Provinces.

[4] Act II of 1886, secs. 20 and 22.

[5] *Ibid*, sec. 23.

[6] *Ibid*, secs. 42 and 43.

[7] Mad. Reg. I of 1805, sec. 13.

as to the particulars of such property. He must also make over all account books, vouchers, and other property of the ward in his hands.[1]

The guardian is entitled to have his accounts examined, and adjusted, and, where the ward has attained majority, the guardian may, where there is nothing due from him, require an acknowledgment in writing to that effect.[2]

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[1] As to the mode of enforcing this duty, see *post*, chap. xix.

[2] Simpson on Infants, 2nd Edn., p. 459.

CHAPTER XVI.

Rights and Powers of Guardians of Person.

Right to custody.

The guardian of a minor's person has, whether he be a natural guardian, or a testamentary guardian, or a guardian appointed by a Civil Court or by the Court of Wards, a right to the custody of the person of his ward,[1] subject to the powers of the Courts to interfere with that custody. The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.[2]

The Penal Law protects the guardian's right to the custody of his male ward under fourteen years of age and of his female ward under sixteen years of age.[3]

Enforcement of right.

A guardian can enforce his right either by a suit, or by the summary proceedings available to him.[4]

Use of force.

He may use a reasonable amount of force to obtain or retain possession of his ward's person where such force does not amount to a breach of the peace.[5]

Prosecution and compounding offences.

A guardian is entitled to prosecute a person committing an offence against his ward, and on behalf of his ward to compound an offence which is capable of being compounded.[6]

Interference with right of guardian appointed by High Court.

Interference with the right of a guardian appointed by a High Court would amount to contempt of the authority of that Court, and would be punishable as such.[7]

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[1] Act VIII of 1890, sec. 24.

[2] *Ibid.*, sec. 25 (3).

[3] Act XLV of 1860, sec. 361, *ante*, p. 51.

[4] *Post*, chap. xx.

[5] See *Ex parte Hopkins*, 3 Peere. Wms., 154; and Forsyth on the Custody of Infants, chap. v.

[6] Act X of 1882, sec. 345.

[7] *Wellesley* v. *Wellesley*, 2 R. & M., 639. In the case of appointments by District Courts such interference

Place of residence of ward.

The guardian is entitled to use his discretion with reference to the place of residence of his ward, and may put proper restraint upon him, so as to prevent him from consorting with persons whose society might be injurious to him.[1]

Removal of ward from jurisdiction.

A guardian of the person appointed or declared by a District Court, unless he is the Collector or is a guardian appointed by will or other instrument, cannot, without the leave of the Court by which he was appointed or declared, remove the ward from the limits of its jurisdiction except for such purposes as may be prescribed.[2]

Such leave may be special or general, and may be defined by the order granting it.[3]

An order refusing such leave, or imposing conditions in respect thereto is appealable to the High Court.[4]

Penalty for removal of ward from jurisdiction.

A guardian who for the purpose or with the effect of preventing the Court from exercising its authority with respect to a ward, so removes the ward from the limits of the jurisdiction of the Court is liable, by order of the Court, to fine not exceeding one thousand rupees, or to imprisonment in the civil jail for a term which may extend to six months.[5] Such order is appealable to the High Court.[6]

Removal of ward by guardian against interests of ward.

Ceasing to reside within the local limits of the jurisdiction of the Court appointing a guardian is a ground for removing a guardian appointed by the Court[7] and ceasing to reside within the local limits of the jurisdiction of the District Court having jurisdiction in the place where the minor for the time being ordinarily resides may be a ground for removing a testamentary guardian.[8] Should a natural guardian be about to remove his ward from his usual place of residence, and such removal be contrary to

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might also in some cases amount to a contempt of Court.

[1] See *Fleming* v. *Pratt*, 1 L. J., K. B., 195.

[2] Act VIII of 1890, sec. 26 (1).

[3] *Ibid.*, sec. 26 (2).

[4] Act VIII of 1890, sec. 47.

[5] *Ibid.*, sec. 44.

[6] *Ibid.*, sec. 47.

[7] *Ibid.*, sec. 39 (*h*), *ante*, p. 110.

[8] *Ante*, p. 110.

the interests of the minor, a friend of the minor might well apply to have a guardian appointed by the Court.[1]

A Court of Wards can determine the place of residence of its wards.

Emigration of parent or guardian.

A parent or guardian who is himself entering into an agreement to emigrate, may, in the name and on behalf of a child under sixteen and over ten years of age, enter into an agreement binding the child to emigrate with him.[2]

A parent may also take with him his children, on whose behalf no such agreement has been entered into by him.[3]

A person emigrating under the provisions of the Inland Emigration Act, 1882, can also take his children with him.[4]

Constraint and correction of wards.

The father or other guardian is entitled to chastise the minor moderately, or to put constraint upon him for the purpose of correction.[5]

Delegation of authority to schoolmaster or another.

The father or other person entitled to the guardianship is entitled either to keep the child under his own control, or to place him in the charge of a proper person,[6] and the father may "also delegate part of his parental authority during his life to the tutor or schoolmaster of his child ; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *viz.*, that of constraint and correction, as may be necessary to answer the purposes for which he is employed."[7]

A father on going to a foreign country may make over the custody of his children for the time being to another, and he does not thereby lose any portion of his rights with regard to them.[8]

Right to give in adoption.

As to the right of a Hindu father to give his son in adoption see Sutherland's Synopsis of the Law of Adoption and Golab Chandra Sarkar's Hindu Law of Adoption.

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[1] *Ante*, chap. xi.

[2] Act XXI of 1883, sec. 40.

[3] See Act XXI of 1883, secs. 6 (3)*a*, 33, and 35 (1).

[4] See Act I of 1882, sec. 3, see also secs. 31, 32, 40, 45, 46, 48, 65, 77, 78, 81, 82, 83, 84, 103 and 107.

[5] Mayne's Indian Penal Code, 9th Edn., p. 286. As to the chastisement of apprentices, see *post*.

[6] *Ex parte McClellan*, 1 Dowl. P. C., 81.

[7] Blackstone's Commentaries by Stephens, vol. ii, 5th Edn., p. 30.

[8] See *Re Suttor*, 2 F. & F., 267.

A guardian has power to bind his ward apprentice to a trade. Act XIX of 1850, which contains the whole law on this subject applicable to this country, provides as follows :— Apprenticing of ward

"Sec. 1. Any child above the age of ten, and under the age of eighteen years, may be bound apprentice by his or her father or guardian to learn any fit trade, craft or employment, for such term as is set forth in the contract of apprenticeship, not exceeding seven years, so that it be not prolonged beyond the time when such child shall be of the full age of twenty-one years, or in the case of a female, beyond the time of her marriage. Apprenticing of child between 10 and 18 years old.

"Sec. 2. The age set forth in the contracts shall be evidence of the age of the child in all questions which arise as to the right of the master to the continuance of the service. Evidence of age in questions as to right of service.

"Sec. 3. Any Magistrate or Justice of the Peace may act with all the powers of a guardian under this Act on behalf of any orphan or poor child abandoned by its parents, or of any child convicted before him or any other Magistrate, of vagrancy, or the commission of any petty offence. Powers of Magistrate or Justice acting for orphans, &c.

"Sec. 4. An orphan or poor child, brought up by any public charity, may be bound apprentice by the governors, directors or managers thereof, as his or her guardians for this purpose. Apprenticing of child brought up by public charity.

"Sec. 5. Any such boy may be bound as an apprentice in the sea-service[1] to any of Her Majesty's subjects, being the owner of any registered ship belonging to and trading from any port in the territories under the Government of India, which has been declared to be a registering port under Act X of 1841, to be employed in any such ship, the property of such person, commanded by a British subject, and, while so employed, to be taught the craft and duty of a seaman. Apprenticing of such boy in sea-service.

[1] It is the duty of shipping masters to give to all persons desirous of apprenticing boys to the sea-service, and duly authorized so to do by Act XIX of 1850, and also to masters and owners of ships requiring apprentices such assistance as may be in their power for facilitating the making of such apprenticeships. Act I of 1859, sec. 4.

Agent of master.

"Sec. 7. The master or commander of any ship in which an apprentice bound to the sea-service shall be appointed to serve by the party to whom he is bound, shall be deemed the agent of such party for the purpose of this Act.

Form and contents of contract of apprenticeship.

"Sec. 8. Every contract of apprenticeship shall be in writing, according to the form given in Schedule A annexed to this Act, or to the like effect, which shall set forth the conditions agreed upon, particularly specifying the age of the apprentice, the term for which he is bound, and what he is to be taught.

Signatures to contract.

"Sec. 9. Every such contract shall be signed by the person to whom the apprentice is bound, and by the person by whom he is bound, and by the apprentice, when he is of the age of fourteen years or more, at the time of binding; but, when the apprentice is bound by the governors, directors, or managers of a public charity, the signature of two of them, or of their secretary or officer, shall be sufficient on behalf of the persons binding the apprentice.

Contract not valid unless executed as prescribed and deposited.

"Sec. 10. No such contract shall be valid unless it be executed in the manner aforesaid, nor until it has been deposited in the office of the Chief Magistrate of the place or district where it has been executed, or, if the apprentice is bound to the sea-service, in the office of the person appointed under Act X of 1841 to make registry of ships at the port where the apprentice is to begin his service; and the person in whose office any such contract is deposited shall give to each of the parties a copy thereof, certified under his hand, which certified copies shall be received as evidence of the contract, without formal proof of the handwriting of the Magistrate or registering officer.

Copies to be given to parties.

Alteration of terms of service and termination of contract.

"Sec. 11. The terms of service may be changed at any time during the apprenticeship, or the contract may be determined with the consent of both parties to the contract or their personal representatives, and with the consent of the apprentice, if he is above the age of fourteen years; provided that the changes agreed to or the termination of the contract shall be expressed in writing on the original

contract, with the signature of the proper parties, according to section 9[1] of this Act; and the Magistrate or registering officer shall thereupon make under his hand corresponding endorsements on the office copies, which shall be brought to him at the same time for that purpose.

Assignment of apprentice to new master.

"Sec. 12. The master of any apprentice bound under this Act may, with the consent of the person by whom he was bound, and with the consent of the apprentice, if he is above the age of fourteen years, assign such apprentice to any other person who is willing to take him for the residue of his apprenticeship, and subject to the conditions thereof; provided that such person shall, by endorsement under his own hand on the contract, declare his acceptance of such apprentice, and acknowledge himself bound by the agreements and covenants therein mentioned, to be performed on the part of the master, and that the consent of the other parties aforesaid shall be expressed in writing on the same, and signed by them respectively; and every such assignment shall be certified on the office copies of the contract under the hand of the Magistrate or registering officer according to the form given in Schedule B annexed to this Act.

Power of Magistrate in case of complaint by apprentice against master.

"Sec. 13. Upon complaint made to any Magistrate in the said territories[2] by or on behalf of any apprentice bound under this Act, of refusal or neglect to provide for him, or to teach him according to the contract of apprenticeship, or of cruelty, or other ill-treatment by his master, or by the agent under whom he shall have been placed by his master, the Magistrate may summon the master or his agent, as the case may be, if he shall be within his jurisdiction, to appear before him at a reasonable time, to be stated on the summons, to answer the complaint;

and at such time, whether the master or his agent be present or not (service of the summons being proved), may examine into the matter of the complaint; and, upon proof thereof, may cancel the contract of apprenticeship,

[1] Act XII of 1891, Sch. 2.

[2] See sec. 5, *ante*, p. 143.

and assess upon the offender, whether he shall be the master or his agent, a reasonable sum for behoof of the apprentice, not exceeding four times the amount of the premium paid upon the binding, or if no premium, or a less premium than Rs. 50 was paid, not exceeding Rs. 200 ;

and, if the offender shall not pay the sum so assessed, may levy the same by distress and sale of his goods and chattels ; and if the offender shall not be the master, but his agent, by distress and sale of the goods and chattels of the master also.

Power of master or his agent to chastise apprentice.

"Sec. 14. No contract of apprenticeship shall be cancelled, nor shall any master or his agent be liable to any criminal proceeding, on account of such moderate chastisement for misbehaviour, given to any apprentice by his master or the agent of his master, as may lawfully be given by a father to his child ;[1] and the provision for enabling the contract of apprenticeship to be cancelled shall not bar any criminal proceeding against any master or his agent for an assault or other offence committed against his apprentice for which he would be liable to be punished, had it been against his child, whether or not any proceeding be taken for cancelling the contract of apprenticeship.

Liability of master or agent for assault, &c.

Power of Magistrate in case of complaint by master against apprentice.

"Sec. 15. Upon complaint made to any Magistrate by or on behalf of the master of any apprentice bound to him under this Act, of any ill-behaviour of such apprentice, or if such apprentice shall have absconded, the Magistrate may issue his warrant for apprehending such apprentice, and may hear and determine the complaint, and punish the offender by an order for keeping the offender, if a boy, in confinement in any debtor's prison or other suitable place, not being a criminal gaol, for any time not exceeding one month, of which one week may be in solitary confinement, during which time such allowance shall be made for his subsistence by the master or his agent as the Magistrate shall order ; and, if the offender be a boy of not more than fourteen years of age,

[1] *Ante*, p. 142.

may order him to be privately whipped; or, if the offender be a girl, or in the case o any boy, the Magistrate deem any such punishment unfit, he may pass an order empowering the master of the apprentice or his agent to keep the offender in close confinement in his own house, or on board the vessel to which he belongs, upon bread and water, or such other plain food as may be given without injury to the health of the apprentice, for a period not exceeding one month.

Cancelment of contract for misconduct of apprentice.

"Sec. 16. Upon complaint of wilful and repeated ill-behaviour on the part of the apprentice, and on the demand of the master, the Magistrate may order the contract of the apprenticeship to be cancelled, whether or not the charge is proved, but only with the consent of the apprentice and of his father or guardian, if the charge is not proved, and such cancelling shall be with or without refund of the whole or part of any premium that may have been paid to the master on binding such apprentice, as to the Magistrate seems fit on consideration of the case; and all sums so refunded shall be applied, under the direction of the Magistrate, for behoof of the apprentice.

Appropriation of sum recovered for apprentice on cancelment of contract.

"Sec. 17. The Magistrate may order any sum received for behoof of the apprentice on cancelling the contract, to be either laid out in binding him to another master, or otherwise for his benefit, or to be paid to the person by whom any premium was paid when he was bound apprentice.

Limitation of complaint of master against apprentice; of apprentice against master.

"Sec. 18. No Magistrate shall entertain a complaint on the part of a master against an apprentice under this Act, unless it be brought within one month after the cause of complaint arose; or, if the cause of complaint arose on boardship during a voyage, within one month after the arrival thereof at a port or place in the said territories: and no Magistrate shall entertain a complaint on the part of an apprentice against his master, or the agent of his master, under this Act, unless it be brought within three months after the cause of complaint arose; or, if the cause of complaint rose on boardship during a voyage,

within three months after the arrival thereof at a port or place in the said territories.[1]

Effect of death of master during apprenticeship.

"Sec. 19. If the master of any apprentice shall die before the end of the apprenticeship, the contract of apprenticeship shall be thereby determined, and a proportionate part, corresponding to the unexpired portion of the term of any premium, which shall have been paid to such master on the binding of the apprentice to him, shall be returned by the executors or administrators out of the estate of the deceased to the person or persons who shall have paid the same; unless the executors or administrators of the deceased master shall continue the business in which such apprentice shall have been employed, and shall, within three months from the death of the late master, make offer in writing to keep the apprentice on the terms of the original contract; in which case the estate of the deceased shall be discharged from all liabilities on account of such premium.

Offer by representative of master to continue apprenticeship.

Offer to be certified on original contract copies.

"Sec. 20. If such offer to keep the apprentice shall be made as aforesaid, the same shall be fully expressed and certified by the executors or[2] administrators on the original contract of apprenticeship, and also on the office copies thereof, by the Magistrate or registering officer; and the apprentice shall be bound to the executors or administrators so keeping him for the remaining term of his apprenticeship.

Maintenance of apprentice whose master dies.

"Sec. 21. Any apprentice bound under the Act, whose master shall die during the apprenticeship, shall be entitled to maintenance for three months, from and after the death of his master, out of the assets left by him; provided that during such three months such apprentice shall continue to live with, and serve as an apprentice, the executors or administrators of such master, or such person as they shall appoint.

Effect of insolvency of master during apprenticeship.

"Sec. 22. The apprentice of any person against whom a commission of bankruptcy shall be issued, or who shall

[1] See sec. 5, *ante*, p. 143.

[2] Act XII of 1891, sch. 2.

be adjudged to have committed an act of insolvency during the apprenticeship, shall be discharged from all obligation under the contract of apprenticeship; and, if any premium was paid on binding him as an apprentice, he or the person by whom he was bound shall be entitled to claim the amount thereof as a debt against the estate of the bankrupt or insolvent.

Persons amenable to jurisdiction of Magistrate's Court.

"Sec. 23. For the purposes of this Act all British subjects, wherever or of whatever parents born, as well as other persons in the territories under the Government of India, without the towns of Calcutta and Madras, and the town and island of Bombay, shall be amenable to the jurisdiction of the Courts and Magistrates of India.

Appeal from orders of Mofussil Magistrates.

"Sec. 24. An appeal shall lie from any order passed by any Magistrate without the said towns and island to the Court of Session to which such Magistrate is subordinate, provided the appeal is made within one month from the date of the order."

Guardian entitled to necessary expenses.

A guardian, whether of the person or property is entitled to be reimbursed, or if the property be in his possession to reimburse himself, all sums properly expended by him on behalf of his ward for the realization, preservation, or benefit of the property or the protection and support of the ward.[1] Where the guardian of the person has not also charge of the property, the guardian of the property must pay to the guardian of the person all sums properly expended by him.

Except he be appointed by a Court, and a salary be allotted to him by that Court,[2] or there be provision to that effect in the instrument appointing him, a guardian is not entitled to any remuneration for his services.

Right of survivorship among joint guardians.

On the death of one of two or more joint guardians, the guardianship continues to the survivor or survivors until a further appointment is made by the Court.[3]

Control of Collector.

As to the control of a Collector appointed or declared by the Court to be guardian see *post*, p. 160

[1] As to his right to be reimbursed for necessaries supplied, see Act IX of 1872, sec. 68, *ante*, p. 19.

[2] *Ante*, pp. 105 and 126.

[3] Act VIII of 1890, sec. 38.

Cessation of authority of Guardian.

The powers of a guardian of the person cease[1]—

(*a*) by his death, removal[2] or discharge ;[3]

(*b*) by the Court of Wards assuming superintendence of the person of the ward ;

(*c*) by the ward ceasing to be a minor ;[4]

(*d*) in the case of a female ward,[5] by her marriage to a husband who is not unfit[6] to be guardian of her person or, if the guardian was appointed or declared by the Court, by her marriage to a husband who is not, in the opinion of the Court, so unfit ; or,

(*e*) in the case of a ward whose father was unfit to be guardian of the person of the ward, by the father ceasing to be so or, if the father was deemed by the Court to be so unfit, by his ceasing to be so in the opinion of the Court.

Compensation for death of child.

A parent may sue for compensation for the loss sustained by him in consequence of the death of his child by what amounts to an actionable wrong.[7]

Compensation for injury to child.

When his child is injured the parent can sue the person who has committed the wrong for damages for loss of service.[8]

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[1] Act VIII of 1890, sec. 41 (1).

[2] *Ante*, pp. 109 to 113.

[3] *Ante*, p. 113.

[4] *i.e.*, on attaining majority according to the Indian Majority Act (*ante*, pp. 8 to 10), Act VIII of 1890, sec. 4 (1).

[5] The marriage of a male ward does not terminate the guardianship.

[6] The word "unfit" is indefinite. Sec. 19 to which it apparently refers deals with unfitness in the opinion of the Court. It will be very difficult, in a case where the Court's opinion as to the unfitness has not been required, to determine whether a guardian's powers have ceased or not.

[7] Act XIII of 1855. *Narayen Jetha* v. *The Municipal Commissioner of Bombay*, I. L. R., 16 Bom., 254.

[8] There must be some evidence of service, although very slight evidence would usually be sufficient. It might sometimes be implied from the relationship. *See* Addison on Torts, 7th Edn., p. 585. The only reported case in India of an action by a father for damages for the seduction of his daughter is, as far as I am aware, that of *Ramlal* v. *Tularam*, I. L. R., 4 All., 97, in which the Judges differred as to whether such a suit would lie in India. It is, of course, not desirable to introduce any fictions of English law into India, but where the father has suffered an actual wrong by the loss of his daughter, there is no reason why he should not recover damages for abduction or seduction. See also *Dulari* v. *Vallabdas Pragji*, I. L. R., 13 Bom., 126.

CHAPTER XVII.

Rights and Powers of Guardian of Property.

A guardian of a minor's property is entitled to have possession of such property on behalf of his ward.[1] He cannot, except, he be seeking to recover it from a former guardian or his representative,[2] obtain any summary remedy, but must proceed by way of suit in the name of his ward. Right to possession of property.

The guardian represents the minor, and notices which must be served in order to affect the minor's property, as, for instance, notices of foreclosure, should be served on the guardian of the minor's estate,[3] if there be one. If there be no legal guardian it is generally best to effect service upon the minor, and also upon the person in whose custody he is. Notices to minors.

Where the property of the minor is under the Court of Wards, notices must be served upon the guardian appointed by that Court.[4]

Subject to the restrictions on the powers of testamentary guardians and of guardians of property appointed or declared by the Court[5] a guardian of property may do all acts which are reasonable and proper for the realisation, protection, and benefit of the property.[6] Powers of a guardian of the property.

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[1] As to the right of the guardian to possession of property to which his ward succeeds, see Mad. Reg. III of 1802, sec. 16, para. 3. A guardian has no rights over property of which the ward is only a trustee. As to minor trustees see *ante*, pp. 38 to 41.

[2] Act VIII of 1890, sec. 41 (3), *post*, chap. XX.

[3] *Rasmonee* v. *Prankishen Das*, 4 Moo. I A., 392; 7 W. R. P. C., 66; *Khettermonee* v. *Kishenmohun Mitter*, Marsh., 313; 2 Hay, 196; see *Dabee Pershad* v. *Man Khan*, 2 N.-W. P. H. C. Rep., 444. As to service of summons and notices in suits, see *post*, chap. xxv.

[4] *Mekaperuma* v. *Collector of Salem*, I. L. R., 12 Mad., 445.

[5] *Post*, p. 155.

[6] Act VIII of 1890, sec. 27.

The powers of a guardian are not co-extensive with those of a full owner.[1] He is a trustee with powers of management occasionally enlarged by necessity.

Ward bound by acts of guardian.

All acts of a guardian strictly within his powers, and done in good faith,[2] and such as the ward might, if of age, prudently do for himself,[3] bind the ward and his estate.

On coming of age the ward must reimburse his guardian for all proper expenditure on his behalf.

Conditions of validity of acts of guardian.

All transactions which guardians enter into on behalf of their wards must secure to the latter some demonstrable advantage, or avert some obvious mischief in order to obtain recognition from the Court.[4] They must show the strictest good faith, and must be based on actual necessity and advantage, and not on calculations of possible benefit.[5]

The following remarks made by Sir William Markby in his Lectures on Indian Law[6] are well worthy of observation by persons dealing with guardians :—

Dealings with guardians.

"He who deals with the representative of another must know that it is the duty of the representative to act in all things to the best of his ability for the benefit of his principal, and if the circumstances be such that a reasonable man ought to suspect that the representative was not so acting, he is bound to abstain dealing further with the representative, until the suspicion is removed. No one is at liberty to deal with a representative whose conduct he doubts. The party dealing with the representative is

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[1] The powers of the guardian would not in any way exceed those which the minor would possess, if of full age, as for instance, he could not transfer property which is by law incapable of being transferred, see *Doolichand* v. *Biybookun Lall*, 6 C. L. R., 528 ; 10 C. L. R., 61 ; Act IV of 1882, sec. 6.

[2] *Hurrochunder Chowdhry* v. *Bungsee Mohun Doss*, 1 W. R. M. A., 16. The concurrence of co-sharers is some evidence of the propriety of the act, *Gireewur Sing* v. *Muddun Lall Doss*, 16 W. R. C. R., 252 ; *Issur Chunder Rai* v. *Rajub Indernarain*, 16 Ben. S. D. A., 349 and 611.

[3] *Temmakal* v. *Subbammal*, 2 Mad. H. C. Rep., 47.

[4] *Dharmaji Vaman* v. *Gurnav Shrinivas*, 10 Bom. H. C R., 311.

[5] *Bodhmul* v. *Gouree Sunkur*, 6 W. R. C. R., 16 ; *Boodhmul* v. *Gowree Sunkur*, 4 W. R. C. R., 71.

[6] P. 81.

not the judge of what is or is not for the benefit of the principal, but he must cease to act as soon as he has reason to believe that the representative is acting improperly. This is a general principle of the law of representation, and applies as much to the certificate-holder representing a minor as to any other representative."

Fraud.

It must also be remembered that fraud, practised either upon or in collusion with the guardian, will invalidate a sale, or any other dealing affecting the property of a minor, which is otherwise unimpeachable.[1]

Fraud by guardian.

A minor will not be allowed to obtain any advantage from a fraud committed by his guardian for his benefit, although he may have been innocent and ignorant thereof.[2] Similarly a ward is not in any way responsible for, or bound by, a fraud practised by his guardian.[3]

Question as to whether guardian acting for himself or for ward.

Where there may be a question as to whether the guardian is acting for himself or for his ward, if the act be for the benefit of the minor, and there be any indication that the guardian was acting for him in the matter, it will be presumed to have been done on his behalf, and if it be within the powers of the guardian, it will bind the ward.[4]

Powers of testamentary guardians and guardians appointed by Court.

The powers of testamentary guardians and guardians appointed or declared by a Court in some respects differ from the powers of guardians who are not clothed with such authority.

Powers of testamentary guardian.

Where a guardian has been appointed by will or other instrument, his power to mortgage or charge, or transfer by sale, gift, exchange or otherwise, immoveable property belonging to his ward, is subject to any restriction

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[1] *Bunseedhur* v. *Bindeseree Dutt Singh*, 10 Moo. I. A., 454; 1 Ind. Jur. N. S., 165.

[2] *Pogose* v. *Delhi and London Bank*, I. L. R., 10 Calc., 951.

[3] *Idem.*

[4] *Watson* v. *Shamloll Mitter*, I L. R., 15 Calc., 8; L. R., 14 I. A., 178; *Hemangineee* v. *Jogendronarain Roy*, 12 W. R. C. R., 236; *Bakur Ali* v. *Sookeea*, 13 W. R. C. R., 63; *Hunooman Pershad Pandey* v. *Babooee Munraj Koonweree*, 6 Moo. I. A. at p. 412; 18 W. R. C. R., note to p. 81. See *Succaram Morarji* v. *Kalidas Kalianji*, I. L. R. 18, Bom., 631.

which may be imposed by the instrument,[1] unless he has been declared guardian under the Guardians' and Wards' Act,[2] and the Court which made the declaration permits him by an order in writing,[3] notwithstanding the restriction, to dispose of[4] any immoveable property specified in the order in a manner permitted by the order.[5]

Care to be exercised in granting permission.

As in the case of a guardian appointed by the Court[6] this permission should not be given except in the case of urgent necessity and for the clear benefit of the ward. It should only be given on the most careful enquiry, and on notice to such persons as would be likely to protect the interests of the ward as against his guardian.

No order should be made except upon the strictest evidence, tested by such materials as may be available to the Court, and after the Court has enquired into the circumstances of the case and determined whether as a matter of law and prudence it is right that any proposed sale or mortgage should take place.[7]

Conditions.

The Court may attach to the permission any reasonable conditions; such for instance as those mentioned in sec. 31 (3) of Act VIII of 1890.[8]

Appeal.

An order refusing permission is appealable to the High Court.[9] An order granting permission is not so appealable.

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[1] In the absence of such restriction his powers over the property of every description are those of any other guardian not appointed by the Court. His powers may by the instrument be extended beyond the ordinary powers of a guardian, provided that such extension be not in excess of the powers of the person appointing the guardian Although the Guardians and Wards Act recognises the appointment of testamentary guardians, it does not extend their powers.

[2] Act VIII of 1890, *ante*, chap. xi.

[3] This order may be made at the time of the declaration or at any time thereafter.

[4] This includes a mortgage or charge or a transfer by sale, gift, exchange or otherwise or a lease for a term extending beyond the date on which the ward will cease to be a minor.

[5] Act VIII of 1890, sec. 28.

[6] *Post*, pp. 155, and 156.

[7] *Per* Garth, C. J., in *Sikher Chand* v. *Dulputty Singh*, I. L. R., 5 Calc., 363, s. c., *Rajah Lall* v. *Delputty Singh*, 5 C. L. R., 374, approved of *in the matter of Shrish Chunder Mookhopadhya*, I. L. R., 6 Calc., 161. As to the contents of the petition, see *post*, p. 155.

[8] *Post*, pp. 156, and 157.

[9] Act VIII of 1890, sec. 47.

This is an additional reason for requiring the greatest care in the making of the order.

Limitation of powers of guardian of property appointed or declared by the Court.

Where a person other than a Collector,[1] or than a guardian appointed by will or other instrument,[2] has been appointed or declared by the Court to be guardian of the property of a ward,[3] he cannot,[4] without the previous permission of the Court,—

(*a*) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immoveable property[5] of his ward, or

(*b*) lease any part of that property for a term exceeding five years or for any term extending more than one year beyond the date on which the ward will cease to be a minor.

Leases.

It follows that a guardian appointed by the Court can lease his wards' property for a term not exceeding five years, provided such term expires within the year after the ward attains majority.

Contents of petition.

The petition for permission should contain all the materials reasonably required to enable the Court to decide the question.[6]

Care in making order.

The same care should be exercised in giving this permission as in the case of a permission to a testamentary guardian.[7] Permission to the guardian to do any of these acts cannot be granted by the Court except in case of necessity or for an evident advantage to the ward.[8]

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[1] Except in sec. 23 (*post*, p. 162), the Act is silent as to the powers of the Collector.

[2] See Act VIII of 1890, sec. 28, *ante*, pp. 153, and 154.

[3] Even although the order may not have been formally drawn up: *Harendranarain Singh Chowdhry* v. *Moran*, I. L. R., 15 Calc., 40.

[4] Act VIII of 1890, sec. 29. This and the other provisions of Act VIII of 1890 apply to guardians appointed by Civil Courts under the Acts repealed by the Guardians and Wards' Act, Act VIII of 1890, sec. 51.

[5] His powers over the moveable property of his ward are the same as those of other guardians: *Ranmal Singji* v. *Vadilal Vakhatchand*, I. L. R., 20 Bom., 61.

[6] *In the matter of Shrish Chunder Mookhopadhya*, I. L. R, 6 Calc., 161.

[7] *Ante*, p. 154.

[8] Act VIII of 1890, sec. 31 (1).

Order permitting transfer, &c.

The order granting the permission must recite the necessity or advantage, as the case may be, describe the property with respect to which the act permitted is to be done, and specify such conditions, if any, as the Court may see fit to attach to the permission.[1] Where the order gives sanction to mortgage it should specify the rate of interest.[2] Where it gives sanction to lease it should specify the term of the lease, and the rate of rent and the amount of the premium (if any). Where it gives sanction to sell it should specify the amount for which a sale should be allowed. These details should all be carefully investigated by the Court, and the Court should ascertain that the minor is obtaining the greatest possible advantage with regard to each of them out of the transaction.

The order must be recorded, dated and signed by the Judge of the Court with his own hand, or, when from any cause he is prevented from recording the order with his own hand, must be taken down in writing from his dictation and be dated and signed by him.[3]

The Court may in its discretion attach to the permission the following among other conditions, namely :—

(*a*) that a sale shall not be completed without the sanction of the Court ;

(*b*) that a sale shall be made to the highest bidder by public auction, before the Court or some person specially appointed by the Court for that purpose, at a time and place to be specified by the Court, after such proclamation of the intended sale as the Court, subject to any rules made under this Act by the High Court, directs ;

(*c*) that a lease shall not be made in consideration of a premium or shall be made for such term of years and subject to such rents and covenants as the Court directs ;

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[1] Act VIII of 1890, sec. 31 (2).

[2] *Gungapershad Sahu* v. *Maharani*, I. L. R., 11 Calc., 379 ; L. R., 12 I. A., 47.

[3] Act VIII of 1890, sec. 31 (2).

(*d*) that the whole or any part of the proceeds of the act permitted shall be paid into the Court by the guardian, to be disbursed therefrom or to be invested by the Court on prescribed securities or to be otherwise disposed of as the Court directs.[1]

Before granting permission to a guardian the Court may cause notice of the application for the permission to be given to any relative or friend of the ward who should, in its opinion, receive notice thereof, and shall hear and record the statement of any person who appears in opposition to the application.[2]

Appeal.

An order refusing permission is appealable to the High Court.[3]

Duty of purchaser at sale under permission.

An innocent purchaser who takes under the order of the Court made, in the case of a testamentary guardian, or of a guardian appointed by the Court, is not bound to look behind that order.[4] This is an additional reason for the exercise of the greatest care in making orders of this description.

Setting aside order.

An order obtained by fraud can be set aside.[5]

Guardian does not retain powers he had before appointment.

A guardian appointed by the Court derives his powers from the Act, and by his appointment loses such powers as he might before have possessed, but which the Act denies to guardians appointed under it.[6] Therefore, a

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[1] Act VIII of 1890, sec. 31(3).

[2] Act VIII of 1890, sec. 31 (4).

[3] Act VIII of 1890, sec. 47. An order granting permission is not appealable, and cannot be contested by suit or otherwise, Act VIII of 1890, sec. 48. It is therefore the more necessary to exercise caution in granting permission.

[4] *Gungapershad Sahu* v. *Maharani*, I. L. R., 11 Calc., at p. 383 ; L. R., 12 I. A., at p. 50 ; *Sikher Chund* v. *Dulputty Singh*, I. L. R., 5 Calc., 363 ; s. c. *Rajahlall* v. *Delputty Singh*, 5 C. L. R., 374. See also *Zain-ul-Abdin Khan* v. *Muhammad Ashgar Ali Khan*, I. L. R., 10 All., 166 ; L. R. 15 I. A., 12.

[5] As to the law in this respect before the passing of Act VIII of 1890, see *Sikher Chand* v. *Dulputty Singh*, I. L. R., 5 Calc., 363 ; s. c., *Rajahlall* v. *Delputty Singh*, 5 C. L. R., 374.

[6] *Shurrut Chunder* v. *Rajkiseen Mookerjee*, 15 B. L. R., 350 ; 24 W. R. C. R., 46. In *Girraj Bakhsh* v. *Hamid Ali*, I. L. R., 9 All., 340, it was held that there being no sanction, the guardian was relegated to

manager of a joint family who has been appointed guardian of minor members cannot, without the sanction of the Court, even in case of necessity, sell or charge the property of his ward.[1]

Voidability of transfers made without permission.

Where a testamentary guardian or a guardian appointed by the Court[2] disposes of immoveable property without being invested with the power so to do, such disposal may be avoided by any other person affected thereby, *i.e.*, by the ward or by the transferree.[3] It may be avoided even if the purchaser, mortgagee, or lessee has acted *bonâ fide*, and paid a fair price for the property; but in such a case where possession is ordered to be restored with mesne profits, it should be made contingent on repayment to the purchaser, mortgagee, or lessee of so much of the purchase-money as has been expended for the benefit of the minor or his estate, with interest at a reasonable rate.[4]

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the powers he would have had, if he had not been appointed by the Court. The High Court of Bengal has declined to follow this case, and the express terms of Act VIII of 1890, sec. 29, make this question clear. See *Anpurnabai* v. *Durgapa Mahalapa*, I. L. R., 20 Bom., 150.

[1] *Shurrut Chunder* v. *Rajkissen Mookerjee*, 15 B. L. R., 350; 24 W. R. C. R., 46.

[2] This might include a person purporting to act as a guardian appointed by a Court although in strictness he might not be entitled so to act; See *Harendranarain Singh Chowdhry* v. *Moran*, I. L. R., 15 Calc., 40.

[3] Act VIII of 1890, sec. 30. It cannot be avoided by the guardian who made the transfer (see *Ram Doolary Kooer* v. *Thacoor Roy*, 2 C. L. R., 547), but it can be avoided either by the ward on attaining majority or during his minority by some other guardian on his behalf; *Sheo Pershad Jha* v. *Gungaram Jha*, 5 W. R. C. R., 221. It can not be enforced against the ward during his minority. The following cases on this subject were decided under Act XL of 1858 *Brijendronarain Roy* v. *Bussuntcoomar Ghose*, 13 W. R. C. R., 300: 15 B. L. R., note to p. 351; *Jungee Lall* v. *Sham Lall Misser*, 20 W. R. C. R., 121; *Shurrut Chunder* v. *Rajkissen Mookerjee*, 15 B. L. R., 350; 24 W. R. C. R., 46; *Debi Dutt Sahoo* v. *Subdra*, I. L. R., 2 Calc., 283; 25 W. R. C. R., 449; *Chimman Singh* v. *Subran Kuar*, I. L. R., 2 All., 902; *Mauji Ram* v. *Tara Singh*, I. L. R., 3 All., 852; *Girraj Bakhsh* v. *Hamid Ali*, I. L. R., 9 All., 340; *Bhupendronarain Dutt* v. *Nemye Chand Mundul*, I. L. R., 15 Calc., 627; *Buchraj Ram* v. *Ramkishen Singh*, 11 C. L. R., 345; *Harendranarain Singh* v. *Moran*, I. L. R., 15 Calc., 40; *Mahomed Arif* v. *Saraswati*, I. L. R., 18 Calc., 259.

[4] *Girraj Bakhsh* v. *Hamid Ali*, I. L. R., 9 All., 340; *Shurrut Chunder* v. *Rajkissen Mookerjee*, 15 B. L. R., 350; 24 W. R. C. R., 46. Act IX of 1872, sec. 65. See *post*, chap. xxi.

An unauthorized lease does not operate even to the extent that a guardian can grant a lease without permission.[1]

Unauthorised transfer confirmed by decree.

Where a mortgage was a proper one, and has been enforced by a decree in a suit, in which the minor was properly represented, the irregularity as to the mortgage having been made without the permission of the Court will not prevail against a purchaser not a party to the suit and having no notice of the defect;[2] where a party to the suit is a purchaser, or where the purchaser has notice of circumstances which should put him upon enquiry, the decree will not protect such purchaser or his vendee,[3] except in the case where the legality of the transfer had been questioned and determined. Where the decree obtained has not been executed, the Court may restrain its execution,[4] until such steps (if any) as may be necessary are taken to set it aside.

Avoidance of unauthorised transfer.

The Court has no power to set aside summarily an unsanctioned dealing with the minor's property. It can only be avoided in the same way as any other unauthorized act of the guardian.[5]

Variation of powers of guardian of property appointed or declared by the Court.

Where a guardian of the property of a ward has been appointed or declared by the Court, and such guardian is not the Collector, the Court may, from time to time, by order, define, restrict or extend his powers with respect to the property of the ward in such manner and to such extent as it may consider to be for the advantage of the ward and consistent with the law to which the ward is subject.[6]

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[1] *Harendranarain Singh Chowdhry*, v. *Moran*, I. L. R., 15 Calc., 40. See *Mahomed Reza* v. *The Collector of Chittagong*, 15 W. R. C. R., 116.

[2] *Alfootoonissa* v. *Goluck Chunder Sen*, 15 B. L. R., note to p. 353; 22 W. R. C. R., 77, followed in *Tilkoer* v. *Anundkishore*, 10 C. L. R., 547. As to the effect of decrees against minors, see *post*, chap. xxvii.

[3] *Debi Dutt Sahoo* v. *Subodra*, I. L. R., 2 Calc., 283; 25 W. R. C. R., 449; *Jungee Lall* v. *Shamlall Misser*, 20 W. R. C. R., 120.

[4] *Buchraj Ram* v. *Ramkishen Singh*, 11 C. L. R., 345.

[5] *Mukrumunnissa* v. *Abdool Jubbar*, 17 W. R. C. R., 171. See *post*, chap. xxi, as to ratification and avoidance of acts of guardians.

[6] Act VIII of 1890, sec. 32.

Appeal.

An appeal lies to the High Court from an order defining, restricting, or extending the powers of a guardian.[1]

Right of guardian so appointed or declared to apply to the Court for opinion in management of property of ward.

A guardian appointed or declared by the Court may apply by petition to the Court which appointed or declared him for its opinion, advice or direction on any present question respecting the management or administration of the property of his ward.[2]

If the Court considers the question to be proper for summary disposal, it shall cause a copy of the petition to be served on, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit.[3]

The guardian stating in good faith the facts in the petition and acting upon the opinion, advice or direction given by the Court is deemed, so far as regards his own responsibility, to have performed his duty as guardian in the subject-matter of the application[4].

Powers of High Courts over guardians appointed by them.

The High Courts can at any time regulate the conduct or proceedings of guardians appointed by them under the powers contained in their Charters,[5] and may by order from time to time limit or increase the powers of such guardians. Except by appointing guardians the High Courts cannot summarily[6] interfere with the dealings of natural or testamentary guardians with the property entrusted to their care.[7]

Powers of guardians appointed by High Courts.

A guardian appointed by a High Court under the powers contained in its Letters Patent would apparently have no power to sell or charge the property of his ward without the sanction of the Court appointing him,[8] even

[1] Act VIII of 1890, sec. 47 (6), but no appeal lies from an order of refusal.

[2] Act VIII of 1890, sec. 33 (1).

[3] Act VIII of 1890, sec, 33 (2).

[4] Act VIII of 1890, sec. 33 (3).

[5] *Ante*, chap. xiv.

[6] A High Court would interfere in a properly framed suit against a guardian, who is mismanaging his ward's estate.

[7] As to their summary powers with regard to the person of a minor, see *post*, chap. xx.

[8] *Re Jagannath Ramji*, I. L. R., 19 Bom., 96. The Court in ordering a sale or charge will permit the minor's name to be used by the Registrar, or such other person as it directs or permits to sell.

although he may before his appointment have possessed such power.[1] He would be wise to apply to the Court to sanction any dealing with the property or expenditure beyond what is usual in the ordinary course of management.[2]

The powers of the District Courts and of the High Courts under the Guardians' and Wards' Act[3] to regulate the conduct and proceedings of guardians are to be found in sec. 43 of that Act which is as follows:—

Orders for regulating conduct or proceedings of guardians and enforcement of those orders.

"(1) The Court may, on the application of any person interested, or of its own motion, make an order regulating the conduct or proceedings of any guardian appointed or declared by the Court.

"(2) Where there are more guardians[4] than one of a ward, and they are unable to agree upon a question affecting his welfare, any of them may apply to the Court for its direction, and the Court may make such order respecting the matter in difference as it thinks fit.

"(3) Except where it appears that the object of making an order under sub-sec. (1) or sub-sec. (2) would be defeated by the delay, the Court shall, before making the order, direct notice of the application therefor or of the intention of the Court to make it, as the case may be, to be given, in a case under sub-sec. (1), to the guardian, or, in a case under sub-sec. (2), to the guardian who has not made the application.

"(4) In case of disobedience to an order made under sub-sec. (1), or sub-sec. (2), the order may be enforced in the same manner as an injunction granted under sec. 492 or sec. 493 of the Code of Civil Procedure, in a case under sub-sec. (1), as if the ward were the plaintiff and the guardian were the defendant or, in a case under sub-sec. (2), as if the guardian who made the application were the plaintiff and the other guardian were the defendant.

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[1] See *ante*, p. 157.

[2] As, for instance, where it is desirable to let the wards' property on lease, or where a large sum has to be spent for a marriage or other ceremony.

[3] Act VIII of 1890.

[4] This apparently applies to all classes of guardians. A single guardian who has not been appointed by the Court cannot apply to the Court for advice or directions.

"(5) Except in a case under sub-sec. (2), nothing in this section shall apply to a Collector who is, as such, a guardian."

Appeal.

An order under sec. 43, regulating the conduct or proceedings of a guardian or settling a matter in difference between joint guardians or enforcing the order is appealable to the High Court.[1]

Powers of testamentary and Court appointed guardians apart from restriction.

A testamentary guardian, except so far as his powers may be restricted by the instrument, which imposes the trust upon him, and a guardian appointed by the Court, except so far as his powers are restricted by sec. 29 of the Guardians' and Wards' Act,[2] or by the Court appointing him have all the powers of other guardians.

Control of Collector as guardian.

A Collector appointed or declared by the Court to be guardian is, in all matters connected with the guardianship of his ward, subject to the control of the Local Government or of such authority as that Government, by notification in the official Gazette, appoints in this behalf.[3] In Bengal it has been notified that a Collector so appointed shall, in all matters connected with the guardianship of his wards, be subject to the control of the Board of Revenue as Court of Wards.[4] The Board has directed that all rules prescribed for the management of ward's estates[5] be followed in the management of estates by a Collector under the Guardians' and Wards' Act, as far as they are applicable, and except as otherwise provided in the Act.[6]

Collector in Bengal to follow rules of Court of Wards.

Powers of natural guardian.

We now come to consider the powers of a guardian who owes his trust neither to an appointment by a Court nor to the will of a person entitled to make an appointment, to charge or dispose of property belonging to his ward.

Unaffected by restriction in Guardians' and Wards' Act.

Although the appointment of a guardian by the Court supersedes the powers of natural and testamentary guardians,[7] the powers of a natural guardian in the absence of

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[1] Act VIII of 1890, sec. 47.

[2] *Ante*, p. 155.

[3] Act VIII of 1890, sec. 23.

[4] *Calcutta Gazette* of the 8th July 1881, p. 668. See *ante*, p. 84.

[5] See chap. xxxii, *post*.

[6] Court of Ward's Rules, sec. 10, Rule 5.

[7] *Ante*, pp. 93, and 94.

such appointment are unaffected by the restrictions which the Guardians' and Wards' Act[1] places upon the powers of guardians appointed by the Court.[2] The validity of his acts must be determined by the general principles which govern the relations of a minor to the manager of his estate,[3] or, in the words of the Guardians' and Wards' Act,[4] he may do all acts which are reasonable and proper for the realization, protection or benefit of the property.

The powers of the manager of a Hindu minor's property have been more often discussed in the Courts of law of this country than those of other guardians.

Hindu law as to sale or mortgage of minor's property.

The circumstances under which the manager of the estate of a Hindu minor is justified in selling or mortgaging his ward's property[5] were clearly defined by the Judicial Committee of the Privy Council in the leading case of *Hunooman Pershad Pandey* v. *Babooee Munraj Koonweree*,[6] the principles of which apply to guardians of Hindu minors.[7]

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[1] Act VIII of 1890, sec. 29, *ante*, p. 155.

[2] *Ramchunder Chuckerbutty* v. *Brojonath Mozoomdar*, I. L. R., 4 Calc., 929; 4 C. L. R., 247, the effect of which was to confirm the decision in *Soondernarain* v. *Bennud Ram*, I. L. R., 4 Calc., 76, and *Shooghury Koer* v. *Boshisht Narain Singh*, 8 W. R. C. R., 331, and to overrule *Abhassi* v. *Rajroop Koonwar*, I. L. R., 4 Calc., 33; 2 C. L. R., 249; *Tusneef Hossein* v. *Sookhoo*, 14 W. R. C. R., 453, and *Khetternath Dass* v. *Ram Jadoo Bhuttacharjee*, 24 W. R. C. R., 49. See also *Boodhmull* v. *Goweee Sankur*, 4 W. R. C. R., 71. There are similar decisions of the High Courts of Bombay and of the North-Western Provinces; *Honapa* v. *Mhalpai*, I. L. R., 15 Bom., 259; *Manishankar Pranjivan* v. *Bai Muli*, I. L. R., 12 Bom., 686; *Bai Amrit* v. *Bai Manek*, 12 Bom. H. C. Rep., 79; *Shiji Hasam* v. *Datu Maoji*, 12 Bom. H. C. Rep., 281; *Roshan Singh* v. *Harkishan Singh*, I. L. R., 3 All., 535; *Heit Singh* v. *Thakoor Singh*, 4 N.-W. P. H. C. Rep., 57; *Seetul Pershad* v. *Chand Khan*, 2 N.-W. P. H. C. Rep., 428. *Contrâ*, *Bai Kesar* v. *Bai Ganga*, 8 Bom. H. C. Rep., A. C. J., 31.

[3] Markby's Lectures on Indian Law, p. 81.

[4] Act VIII of 1890, sec. 27, *ante*, p. 151.

[5] Whether moveable or immoveable; *Rammal Singji* v. *Vadilal Vakhatchand*, I. L. R., 10 Bom., 61.

[6] 6 Moo. I. A., 393; 18 W. R. C. R., note to p. 81.

[7] *Radha Kishore Mookerjee* v. *Mirtoonjoy Gow*, 7 W. R. C. R., 23; *Dalpatsing* v. *Nanabhai*, 2 Bom H. C. Rep., 306; *Succaram Morarji* v. *Kalidas Kallianji*, I. L. R., 18 Bom., 631; *Murari* v. *Tayana*, I. L. R., 20 Bom., 286.

Under Hindu law *de facto* manager has same power as *de jure* manager.

The first rule laid down in that case was that, under the Hindu law, the right of a *bonâ fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge, had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title.[1] A sale, however, by a person who does not in any way represent the minor, may be avoided by the minor on that ground only.

Reasons for this distinction.

The joint family system prevalent amongst Hindus seems to be one of the reasons for this distinction between the Hindu law and the other systems of law administered in British India. The *kurta* of an undivided family is in the position of guardian of the shares of the minor members, although the minors may have other relations entitled to the guardianship of their estates. In one case,[2] where the father of the minors was alive, and had not consented to the sale of their property, the High Court upheld a sale by the brother of the minors on the authority of *Hunooman Pershad Pandey's* case, and on the ground that the brother was *de facto* acting in the matter as the guardian of his brothers.

Manager can either sell or charge.

No distinction can be drawn between the power to charge and the power to sell, and the need which would justify the exercise of the one would justify that of the other.

Power of manager under Hindu law to charge estate of minor.

With reference to the power of the manager or guardian of the estate of a minor heir, to charge such estate, the Privy Council, in *Hunooman Pershad Pandey's* case,[3] said:—"The power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one

[1] See also *Gunga Pershad* v. *Phool Singh*, 10 W. R. C. R., 106; 10 B. L. R., note to p. 368.

[2] *Gunga Pershad* v. *Phool Singh*, 10 W. R. C. R., 106; 10 B. L. R., note to p. 368.

[3] 6 Moo. I. A., 423; 18 W. R. C. R., note to p. 81.

that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But, of course, if that danger arises, or has arisen, from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore, the lender in this case, unless he is shown to have acted *malâ fide*, will not be affected though it be shown that with better management the estate might have been kept free from debt."

Benefit apart from necessity.

This would seem to show that the manager can charge or alienate the minor's estate on the ground of benefit in addition to that of necessity. There have been, since the decision of the Privy Council in *Hunooman Pershad Pandey's* case, a very large number of decisions of the High Courts in India applying the principles laid down in that case, but, so far as the writer is aware, there is not any case where the sale of a minor's property has been upheld except on the ground of its being justified by the necessities of the minor or of his estate.[1] Apart from necessity, it is not

[1] Perhaps the right way of reading the *dictum* in *Hunooman Pershad Pandey's* case is in the words of the Sudder Court in the case of *Goorooprsaud Jena* v. *Muddunmohun Soor*, 12 Ben. S. D. A. Rep., 980, which was decided shortly after *Hunooman Pershad Pandey's* case, but without reference to that case: "It is enough for us now to say that we hold that a mortgage entered into by the mother of a minor of a portion of the minor's property for the benefit of the minor, is valid under Hindu law, that benefit being the causing of, or creating, a necessity which has arisen." Further on, in the same judgment, the Court said:—"The benefit of the minor as creating the necessity is the test by which the legality of the transaction must be tried; but setting authority aside, and looking only to the reason of the thing, it seems to us that the rule in such cases as that now before us, is, that a party filling a fiduciary character like that of a guardian is authorized to perform any act which is manifestly for the infant's benefit." In this case, however, the land was mortgaged to prevent a sale for arrears of Government revenue which amounts to a necessity, and therefore, the actual decision in the case is not of much assistance on this point.

easy to say what is for the benefit of the minor's estate. It is not intended that this power should authorize the guardian to sell or charge the inheritance for the purpose only of increasing the immediate income of the minor or of his estate. In *Radha Pershad Singh* v. *Talook Rajkooer*,[1] the Court held, that "even if it be desirable that a minor should have any benefit, such as an increase to a very small income, from some undertaking or enterprise, *e.g.*, obtaining a lease of certain rents, that circumstance is not sufficient to constitute a necessity for the mother and guardian to mortgage the minor's ancestral property with a view to secure such benefit."

What necessity will justify sale or incumbrance.

The next question is what necessity will, under the Hindu law, justify the sale or incumbrance of a minor's property. To preserve the minor and his family from want and to provide for their maintenance and support,[2] or for the minor's necessary advancement in life to enable him to earn a livelihood, the guardian is justified in selling or charging the property; but it is not necessary to authorize a sale of the minor's property, that the family should be in absolute and urgent want of the necessaries of life at the very moment, or sufficient to take away the power, that they are subsisting at the time upon the charitable donations of their friends and relations, who may at any moment withdraw their help from them. Land is not to be sold at a moment's warning, but if the family have no certain resource for the future, and no actual means of providing for themselves the decent necessaries of life according to their condition, and no regular competent allowance, but only mere casual charity, this constitutes a reasonable necessity to warrant the sale of the property.[3]

For maintenance.

Where the minor has other means of subsistence, as where his father is alive and capable of supporting him,

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[1] 20 W. R. C. R., 38. See also *Kaikur Singh* v. *Roop Singh*, 3 N.-W. P. H. C. Rep., 4.

[2] *Gunputlall* v. *Toorun*, 16 W. R. C. R., 52; *Soorjoopershad* v. *Krishan Pertab*, 1 N.-W. P. H. C. Rep., 49; *Makundi* v. *Sarabsukh*, I.L.R., 6 All., 417.

[3] *Bissonath Dutt* v. *Doorgapersad Dey*, East's notes, case 34; Morley's Dig., vol. ii, p. 49.

the minor's land cannot be sold for his maintenance,[1] except in the case where there is no means of compelling the father to maintain him.

Sale by mother.

It has been held[2] that a Hindu widow who is compelled to sell the property of her sons in order to preserve them from want, should consult the relations of her children before selling the property; but that, in case of their refusing their consent, or in a case of emergency, as the subsistence of a child, the portion of a daughter, and a *shraddh*, she can sell without their consent. This obligation upon the widow amounts to very little, and the consent or dissent of the relations does not alter her powers. She can only sell in cases of necessity, and then independently of the consent of the relations. In other cases, no amount of consent on the part of the relations would justify the widow in selling the property, but their consent may be some evidence of the *bonâ fides* of the transaction.[3]

Payment of debts of ancestor.

The payment of the debts of the ancestor, through whom the minor acquired his property, provided they are such as to bind his estate,[4] constitutes a sufficient legal necessity for sale or mortgage,[5] although no suit

[1] *Kishen Lochan Bose* v. *Tarini*, 5 Sel. Rep., 55; 2nd Edn., 66. As to the maintenance of minors, see *post*, chap. xxii.

[2] *Bissonath Dutt* v. *Doorgapersad Dey*, East's notes, case 34; Morley's Dig., vol. ii, p. 50.

[3] See *Balvant Santaram* v. *Babaji*, I. L. R., 8 Bom., 602.

[4] Debts barred by limitation would not be sufficient: *Melgirappa* v. *Shivappa*, 6 Bom. H. C. Rep., 270.

[5] See Macnaghten's Hindu Law, vol. ii, chap. xi, case 6; Act VII (Bo. C.), of 1866, sec. 5; *Gunput Lall* v. *Toorun*, 16 W. R. C. R., 52; *Soorjoo Pershad* v. *Krishan Pertab*, 1 N.-W. P. H. C. Rep., 49. As to this proposition there was, at one time some doubt. Macnaghten in his Principles of Hindu Law, Edn. 1829, says (chap. vii, p. 105): "Where the heir is a minor, the creditor must wait until the minority expires before he can come upon the assets for the liquidation of his debts. Subject to this condition, the son must pay his father's debts, as well as all necessary debts contracted on his account during his minority." And again he says (chap. vii, p. 111): "A guardian may, indeed, dispose of a portion (of the property) to meet a necessity arising for the minor's subsistence, but no necessity can by possibility arise for disposing of any portion to pay the minor's father's debts, for he must cease to be a minor before he can be liable." This doctrine, however, has long fallen into disuse, and minority would not now be held to be any

may have been brought for the purpose of recovering them.[1]

Payment of debts by father under Mitakshara law.

According to the Mitakshara and Mithila schools of Hindu law, the payment of a father's debt even in his lifetime, is a pious duty on the part of a son. The discharge of such debt is therefore such a necessary purpose as to give validity to a sale or mortgage of ancestral property by the father provided that the debt has not been incurred for immoral purposes.[2] A debt contracted by a father to enable him to earn a maintenance would justify a sale or charge.[3]

Other instances of necessity sufficient to justify a sale or charge are—

Religious ceremonies.

(1) The performance of an indispensable religious ceremony,[4] such as the initiatory ceremony of the minor,[5] the funeral ceremonies[6] or *shraddh* of the minor's

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defence to a suit for the administration of the property of the minor's deceased ancestor; See *Dagdu* v. *Kamble*, 2 Bom. H. C. Rep., 348, and *Luchmun Dass* v. *Giridhur Chowdhry*, I. L. R., 5 Calc., 855; 6 C. L. R., 473.

[1] *Kaihur Singh* v. *Roop Singh*, 3 N.-W. P. H. C. Rep., 4.

[2] *Laljee Sahoy* v. *Fakeer Chand*, I. L. R., 6 Calc., 135; 7 C. L. R., 97; *Girdharee Lall* v. *Kantoolall*, L. R., I. A., 321; 14 B. L. R., 187; and 22 W. R. P. C., 56: *Pursid Narain Singh* v. *Hunooman Sahoy*, I. L. R., 5 Calc., 845; 5 C. L. R., 576; *Badri Pershad* v. *Madan Lal*, I. L. R., 15 All., 75; *Upooroop Tewary* v. *Bandhjee Sahoy*, I. L. R., 6 Calc., 749; 8 C. L. R., 192; *Gunga Pershad* v. *Ajoodhyapershad Singh*, I. L. R., 8 Calc., 131; s. c., *Gunga Pershad* v. *Sheodyal Singh*, 9 C. L. R., 417; *Hanuman Kamat* v. *Dowlut Mundar*, I. L. R., 10 Calc., 528; *Bhowna* v. *Roopkishore*, 5 N.-W. P. H. C. Rep., 89; *Khalibux Rahman* v. *Gobindo Pershad*, I. L. R., 20 Calc., 328; *Trimbak Balkrishna* v. *Narayan Damodar Dabholkar*, I. L. R., 8 Bom., 481; *Fakirchund Motichund* v. *Motichund Hurruckchund*, I.L.R., 7 Bom., 438; *Jamna* v. *Nain Sukh*, I. L. R., 9 All., 493; *Ponnappa Pillai* v. *Pappu Vayyangar*, I. L. R., 4 Mad., 1; *Sundraraja Ayyangar* v. *Jaganada Pillai*, I. L. R., 4 Mad., 111. After the father's death the payment of his debts, which have not been incurred for immoral purposes, would amount to a necessity. See *Luchmun Dass* v. *Giridhur Chowdhry*, I. L. R., 5 Calc., 855; 6 C. L. R., 473; *Gungapershad* v. *Ajudhya Pershad*, I. L. R., 8 Calc., 131; s. c., *Gunga Pershad* v. *Sheodyal Singh*, 9 C. L. R., 417.

[3] *Babaji Mahadaji* v. *Krishnaji Devji*, I. L. R., 2 Bom., 666.

[4] *Saravana Tevan* v. *Muttayi Ammal*, 6 Mad. H. C. Rep., 371.

[5] Macnaghten's Hindu Law, vol. ii, chap. xi, case 6.

[6] *Nathuram* v. *Shoma Chhagan*, I. L. R., 14 Bom., 562.

father,[1] or of his father's widow[2] or a debt incurred on that account.[3]

(2) The reasonable marriage expenses of the minor,[4] and of the dependent female members of his family.[5] Marriage expenses.

(3) The necessary expenses of a suit or prosecution brought against the minor,[6] or prosecuted on his behalf for the recovery or preservation of his estate, or for the protection of his person. Expenses of litigation.

(4) The payment of Government revenue or other dues, the non-payment of which would imperil the estate.[7]

All circumstances of pressure which render the raising of money necessary for the protection or preservation of the minor's estate, or for his personal well-being, would support a sale or charge.

In determining whether a sale or mortgage for a family necessity is justifiable, a reasonable latitude must be allowed for the exercise of the manager's judgment, especially in the case of a father or of a manager of a trading family, though this must not be extended so far as to free the persons dealing with him from the need of all precautions where a minor has an interest in the property.[8] Family necessity.

The circumstance that to meet the necessities of his ward the guardian has pledged his personal credit does not disentitle him to charge or sell the ward's property,[9] but he can only charge or sell it for the purpose of paying money which the minor was under an obligation to pay.[10] Guardian may sell to repay money borrowed on personal credit.

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[1] *Sukeenath Banoo* v. *Huro Churn Buruj*, 6 W. R. C. R., 34; *Gunput Lall* v. *Toorun*, 16 W. R. C. R., 52. See Macnaghten's Hindu Law, vol. ii, chap. xi, case 6.

[2] *Sadashiv Bhaskar Joshi* v. *Dhakubai*, I. L. R., 5 Bom., 450.

[3] *Gunput Lall* v. *Toorun*, 16 W. R. C. R, 52.

[4] *Juggessur Sircar* v. *Nilambur Biswas*, 3 W. R. C. R., 217; *Gunput Lall* v. *Toorun*, 16 W. R. C. R., 52; *Makundi* v. *Sarabsukh*, I. L. R., 6 All., 417.

[5] *Preaj Narain* v. *Ajodhyapersad*, 7 Sel. Rep., 513; 2nd Edn., 602.

[6] *Gunga Pershad* v. *Phool Singh*, 10 W. R. C. R., 106; 10 B. L. R., note to p. 368.

[7] Macnaghten's Hindu Law, vol. ii, chap. xi, case 2, p. 293; *Goorooprasad Jena* v. *Muddunmohun Soor*, 12 Ben. S. D. A. Rep., 980.

[8] *Babaji Mahadaji* v. *Krishnaji Devji*, I. L. R., 2 Bom., 666.

[9] *Succaram Morarji* v. *Kalidas Kallianji*, I. L. R., 18 Bom., 631.

[10] *Rammal Singji* v. *Vadilal Vakhatchand*, I. L. R., 20 Bom., 61.

Purchaser or mortgagee bound to enquire as to necessity.

Hunooman Pershad Pandey's case[1], and the decisions following it, also decide that a person lending money on the security of a minor's estate, or buying that estate, is bound to exercise due care and attention in seeing that there was a legal necessity for the loan,[2] and must satisfy himself as well as he can,[3] and as an honest man,[4] with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate,[5] and that circumstances of necessity had occurred which, under the Hindu law, would justify the sale of the property.[6]

But he need not see to the application of the purchase-money.

If he does so enquire and acts honestly, the real existence of an alleged sufficient, and reasonably credited, necessity is not a condition precedent to the validity of his charge ;[7] and, under such circumstances, he is not bound to see to the application of the purchase-money.[8] "It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security ; and that, therefore, the mere creation of a charge securing a proper debt cannot be viewed as improvident management. The purposes

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[1] *Ante*, p. 163.

[2] *Gour Pershad Narain* v. *Sheo Pershad Ram*, 5 W. R. C. R., 103 ; *Lootf Hossein* v. *Dursun Lall Sahoo*, 23 W. R. C. R., 424.

[3] *Muthoora Doss* v. *Kanoo Beharee Singh*, 21 W. R. C. R., 287.

[4] *Looloo Singh* v. *Rajendur Laha*, 8 W. R. C. R., 364 ; *Runnoo Pandey* v. *Buksh Ali*, 3 N.-W. P. H. C. Rep., 2.

[5] *Bunseedhur* v. *Bindeseree Dutt Singh*, 10 Moo. I. A., 471 ; 1 Ind. Jur. N. S, 165 ; *Trimbak Anant* v. *Gopalshet*, 1 Bom. H. C. Rep., 2nd Ed., 27 ; *Mahabeer Pershad Singh* v. *Dumreeram Opadhya*, W. R. 1864, C. R., 166.

[6] *Kasheenath Bose* v. *Chunder Mohun Nundee*, 14 Ben. S. D. A., 1791. A judgment-debt binding the minor or his estate is *primâ facie* proof of necessity : *Girdharee Lall* v. *Kantoo Lall*, 14 B. L. R., 199 ; L. R., 1 I. A., 334 ; *Bhowâ* v. *Roopkishore*, 5 N.-W. P. H. C. Rep., 89 ; *Sheoraj Kooer* v. *Nuckchedee Lall*, 14 W. R. C. R., 72 : see however, *Lootf Hossein* v. *Dursun Lall Sahoo*, 23 W. R. C. R., 424.

[7] See also *Tajoodeen Hossein* v. *Bhugwanlol Sahoo*, 16 Ben. S. D. A., 33 ; *Mahabeer Pershad Singh* v. *Dumreeram Opadhya*, W. R. 1864, C. R., 166 ; Act IV of 1882, sec. 38.

[8] Similar decision in *Radha Kishore Mookerjee* v. *Mirtoonjoy Gour*, 7 W. R. C. R., 23 ; *Sukeenath Banoo* v. *Huro Churn Bury*, 6 W. R. C. R., 34 ; *Mahabeer Pershad Sing* v. *Dumreeram Opadhya*, W. R. 1864, C. R., 166 : *Gomain Sircar* v. *Prannath Goopto*, 1 W. R. C. R., 14.

for which a loan is wanted are often future as regards the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application."[1]

The fact of there being a necessity and sufficient pressure on the estate is all that the lender need enquire about.[2] He need not enquire into its causes,[3] or what is the exact amount required to be borrowed.[4] Where the lender knows, or by ordinary diligence might have known, that there weer funds available and sufficient for paying off the debt, the sale would be invalid.[5]

Joint family debt.

The lender must be entirely on his guard. If he is lending for the purposes of a family, he must see whether the family with which he is dealing be divided or undivided; and if the latter, at his peril he must see that the transaction be one by which the co-heirs will be concluded.[6] The debt incurred by the head of a joint Hindu family is, under ordinary circumstances, presumed to be a family debt; but when one of the members is a minor, the creditor seeking to enforce his claim against the family property must see that the transaction is entered into for some common family necessity, or on account of the necessities of the minor.[7] The fact that other adult members of the family support the manager in the transaction might justify the person advancing the money in giving additional credit to the representations of the manager.[8]

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[1] *Hunooman Pershad Pandey* v. *Babooee Munraj Koonweree*, 6 Moo. I. A. at p 424; 18 W. R. C. R., note to p. 81.

[2] *Sheoraj Kooer* v. *Nuckchedee Lall*, 14 W. R. C. R., 72.

[3] *Mohabeer Kooer* v. *Joobha Singh*, 16 W. R. C. R., 221.

[4] *Nuffer Chunder Bannerjee* v. *Guddadhur Mundle*, 3 W. R. C. R., 122.

[5] *Kaleenarain Roy Chowdhry* v. *Ram Coomar Chand*, W. R. 1864, C. R., 99; see *Gomain Sircar* v. *Prannath Goopto*, 1 W. R. C. R., 14.

[6] Strange's Hindu Law, vol. i, p. 200; *Dalpatsing* v. *Nanabhai*, 2 Bom. H. C. Rep., 306.

[7] *Trimbak Anant* v. *Gopalshet*, 1 Bom. H. C. Rep., 2nd Ed., 27; *Tandavaraya Mudali* v. *Valli Ammal*, 1 Mad. H. C. Rep., 398; *Babaji Mahadaji* v. *Krishnaji Devji*, I.L.R., 2 Bom., 666.

[8] *Balvant Santaram* v. *Babaji*, I. L. R., 8 Bom., 609.

Lender must not take unfair advantage of guardian.

The lender must take no unfair advantage of the guardian, and where the guardian is a *purdahnashin*, and the purchaser or lender is a man of business, the fact that the guardian has had no independent advice will raise a strong presumption of fraud against the purchaser, whose duty it is to see that she is provided with such advice.[1]

Burden of proof in suit by minor to set aside sale or mortgage.

Where a suit is brought by a minor on coming of age to set aside a sale or mortgage contracted for him by his guardian during his minority, the purchaser or mortgagee must prove that the transaction was entered into in good faith ;[2] that he advanced in consideration of the sale or mortgage a sum of money reasonable with reference to the value of the property ;[3] that the money was raised for the relief of a recognised necessity ; or that proper enquiries were made by him with respect to the existence of a necessity justifying the sale, and that the result of such enquiries was such as to satisfy him as an honest man of the existence of such necessity.[4]

In *Hunooman Pershad Pandey's*[5] *case* their Lordships of the Privy Council said :—"Next as to the consideration for the bond. The argument for the appellant in the reply, if correct, would indeed reduce the matter for consideration to a very short point ; for, according to that argument, if the *factum* of a deed of charge by a manager for an infant be established, and the fact of the advance

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[1] *Bunseedhur* v. *Bindeseree Dutt Singh*, 10 Moo. I. A., 471 ; 1 Ind. Jur. N. S., 165 ; *Wajid Khan* v. *Ewaz Ali Khan*, I. L. R., 18 Calc., 545 ; L. R., 18 I. A., 144 ; *Ashgar Ali* v. *Delroos Banoo*, I. L. R., 3 Calc., 324.

[2] *Roopnarain Sing* v. *Gugadhur Pershad Narain*, 9 W. R. C. R., 297.

[3] See *Saravana Tevan* v. *Muttayi Ammal*, 6 Mad. H. C. Rep., 371.

[4] *Amarnath Sah* v. *Achan Kuar*, I. L. R., 14 All., 420 ; L. R., 19 I. A., 196 ; *Kameswar Pershad* v. *Run Bahadoor Singh*, I. L. R., 6 Calc., 843; L. R., 8 I. A., 8 ; 8 C. L. R., 361 ; *Poolunder Singh* v. *Ram Pershad*, 2 Agra H. C. Reps., 147 ; *Kasheenath Bose* v. *Chunder Mohun Nundee*, 14 Ben. S. D. A., 1791 ; *Bheknarain Singh* v. *Januk Singh*, I. L. R., 2 Calc., 438 ; *Jamna* v. *Nainsukh*, I. L. R., 9 All., 493 ; *Kumola Pershad Narain Singh* v. *Nokh Lall Sahoo*, 6 W. R., C. R , 30 ; *Sheo Pershad Ram* v. *Thakoor Pershad*, 5 W. R. C. R., 103 ; and cases, *ante*, p. 170.

[5] *Hunooman Pershad Pandey* v. *Babooee Munraj Koonweree*, 6 Moo. I. A., 393; 18 W. R. C. R., note to p. 81.

be proved, the presumption of law is *primâ facie*, to support the charge and the onus of disproving it rests on the heir. For this position a decision, or rather a *dictum* of the Sudder Dewany Adawlut at Agra in the case of *Omed Rai* v. *Heeralall*,[1] was quoted and relied upon. But the *dictum* there, though general, must be read in connection with the facts of that case. It might be a correct course to adopt with reference to suits of that particular character, which was one where the sons of a living father were, with his suspected collusion, attempting, in a suit against a creditor, to get rid of the charge on an ancestral estate created by the father, on the ground of the alleged misconduct of the father in extravagant waste of the estate. Now, it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know, or to come prepared with proof, of the antecedent economy and good conduct of the owner of an ancestral estate; whilst the antecedents of their father's career would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger; consequently, this *dictum* may perhaps be supported on the general principle that the allegation, and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge,[2] as well as on the obvious ground in such suits of the danger of collusion between father and sons in fraud of the creditor of the former. But this case is of a description wholly different, and the *dictum* does not profess to be a general one, nor is it so to be regarded. Their Lordships think that the question on whom does the *onus* of proof lie in such suits as the present is one not capable of a general and inflexible answer. The presumption proper to be made will vary with

[1] 6 S. D. A. N.-W. P., 618.

[2] See also the Indian Evidence Act I of 1872, sec. 106, which provides that "when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him."

circumstances, and must be regulated by, and dependent on, them.[1] Thus, where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour made by one, whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan.

Representations by manager or guardian.

"It is to be observed that the representations by the manager accompanying the loan as part of the *res gestæ* and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir; and as their Lordships are informed that such *primâ facie* proof has been generally required in the Supreme Court of Calcutta between the lender and the heir; where the lender is enforcing his security against the heir, they think it reasonable and right that it should be required. A case in the time of Sir Edward Hyde East, reported in his decisions in the 2nd volume of Morley's Digest, seems to be the foundation of this practice (see also the case of *Brown* v. *Ram Kunaee Dutt*).[2] It is obvious, however, that it might be unreasonable to require such proof from one not an original party after a lapse of time and enjoyment, and apparent acquiescence; consequently, if, as is the case here as to part of the charge, it be created by substitution of a new security for an older one, when the consideration for the older one was an old precedent debt of an ancestor not previously questioned, a presumption of the kind contended for by the appellant would be reasonable."

Fraud.

Evidence of the *bona fides* of the transaction would of course be subject to be rebutted by evidence that the purchaser had acted *malâ fide*, or in collusion with the

[1] See *Kaihur Singh* v. *Roop Singh*, 3 N.-W. P. H. C. Rep., 4.

[2] 11 Ben. S. D. A., 79.

manager or guardian to the injury of the minor.[1] If there be any fraud in proceedings to enforce a charge, which was free from fraud, such proceedings may be set aside.[2]

Charge for a portion of advance.

When the purchaser or lender is unable to prove necessity for the raising of the whole of the money, or he is unable to prove that he was satisfied as to the necessity for the raising of the whole sum, he is entitled to a charge on the property for the amount which it was necessary to raise, or which after reasonable enquiries was shewn to him to be necessary to raise.[3] In any case he would be entitled to a charge for what is actually applied for the benefit of the minor[4]. In the case of his obtaining such charge, a creditor, who has acted fairly, would ordinarily be entitled to interest at the contract rate.

Interest.

Adequacy of price.

In determining the question of the validity of a sale, adequacy of price is often an important point to be considered,[5] though inadequacy of price is not necessarily conclusive proof of *malâ fides*.[6] The mere fact that the manager or guardian might at the time of the sale have been able to make some more advantageous arrangement for the estate of the minor would not nullify a sale to *bonâ fide* purchasers for value.[7]

Burden of proof not altered by foreclosure proceedings or decree.

Foreclosure proceedings, or a purchase at a sale held under a decree in a suit on the mortgage would not relieve a mortgagee from the burden of proving the *bonâ fides* of the transaction, or place him in any better position with regard to the minor,[8] although a *bonâ fide* purchaser without notice at a sale held in execution of a decree in a

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[1] *Bunseedhur* v. *Bindeseree Dutt Singh*, 10 Moo. I. A., 454; 1 Ind. Jur. N. S., 165.

[2] As to the rights of a purchaser at an execution-sale without notice of the fraud, see *Khettermonee* v. *Kishenmohun Mitter*, Marsh., 313; 2 Hay, 196; *Abdul Haye* v. *Nawab Raj*, B. L. R., F. B. R., 911; 9 W. R. C. R., 196.

[3] *Doorganath Roy* v. *Ramchunder*, I. L. R., 2 Calc., 341; L. R., 4 I. A., 52.

[4] *Muthoora Doss* v. *Kanoo Beharee Singh*, 21 W. R. C. R., 287. See *ante*, p. 158.

[5] *Dagdu* v. *Kamble*, 2 Bom. H. C. Rep., 348; *Khettermonee* v. *Kishenmohun Mitter*, Marsh. 313; 2 Hay, 196; *Kumola Pershad Narain Singh* v. *Nokh Lall Sahoo*, 6 W. R. C. R., 30.

[6] *Kumola Pershad Narain Singh* v. *Nokh Lall Sahoo*, 6 W. R. C. R., 30.

[7] *Kool Chunder Surmah* v. *Ramjoy Surmona*, 10 W. R. C. R., 8.

[8] *Buzrung Sahay Singh* v. *Mantora Chowdhrain*, 22 W. R. C. R., 119.

suit in which the minor was properly represented might not be bound to enquire into the propriety of the loan which formed the basis of the decree.[1]

Sale and mortgage under Mahomedan law.

The Mahomedan law permits no one except the *near* guardians[2] of a minor under any circumstances to alienate the minor's property.[3]

Where, however, the minor had received any advantage by the sale or incumbrance, the Court, in setting it aside at his instance will require him to recoup the purchaser or incumbrancer to the extent of the advantage.[4]

Remote guardians[5] can only sell with the sanction of the ruling authority,[6] in whom the power to sell vests in default of *near* guardians.

The following are alone the circumstances under which a *near* guardian can sell the immoveable property of his ward[7] :—

(1) where he can obtain double its value ;

(2) where the minor has no other property, and the sale of it is absolutely necessary for his maintenance ;

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[1] *Post*, chap. xxvii.

[2] As to what are *near* guardians, see *ante*, p. 60.

[3] *Baba* v. *Shivappa*, I. L. R., 20 Bom., 199 ; *Bhutnath Dey* v. *Ahmed Hosain*, I. L. R., 11 Calc., 417 ; *Nizam-ud-din Shah* v. *Anandi Prasad*, I. L. R., 18 All., 373 ; *Bukshan* v. *Maldai*, 3 B. L. R., A. C., 423 ; s. c. *Bukshun* v. *Doolhin*, 12 W. R. C. R., 337 ; *Rutton* v. *Dhoomee Khan*, 4 Agra H. C. Rep., 21 ; *Hamir Singh* v. *Zakia*, I. L. R., 1 All., 57 ; Macnaghten's Principles of Mahomedan Law, chap. viii, princ. 6 ; *Sitaram* v. *Amir*, I. L. R., 8 All. at p. 338. In *Hasan Ali* v. *Mehdi Husain*, I. L. R. 1 All., 533, the Court upheld a mortgage by an aunt who was manager, but in this case there was no offer by the ward to pay the amount which had been expended on his behalf. In *Gulabdas Jugjivandas* v. *Collector of Surat*, I. L. R., 3 Bom., 186 ; L. R., 6 I. A. 54 ; a mortgage by a brother was set aside, and in *Seetul Pershad* v. *Chand Khan*, 2 N.-W. P. H. C. Rep., 428, a similar mortgage was upheld.

[4] *Bukshan* v. *Maldai*, 3 B. L. R., A C., 423 ; s. c. *Bukshun* v. *Doolhin*, 12 W. R. C. R., 337 ; *Hamir Singh* v. *Zakia*, I. L. R., 1 All., 57 ; *Pana Ali* v. *Sadik Hossein*, 7 N.-W. P. H. C. Rep., 201 ; *Suhee Ram* v. *Mahomed Abdul Rahaman*, 6 N.-W. P. H. C. Rep., 268 ; *Nizam-ud-din* v. *Anandi Prasad*, I. L. R., 18 All., 373 ; see *post*, chap. xxi.

[5] *Ante*, p. 61.

[6] That is ordinarily the Court, as representing the ruling authority. In *Husein* v. *Zia-ul-Nissa*, I. L. R., 6 Bom., 467, a sale at Surat with the assent of the Agent of the Governor of Bombay was upheld.

[7] Macnaghten's Principles of Mahomedan Law, chap. viii, princ. 14 ; *Bishnath Singh* v. *Ashrafunnissa*,

(3) where the late incumbent died in debt which cannot be liquidated but by the sale of such property ;

(4) where there are some general provisions in the will, which cannot be carried into effect without such sale ;

(5) where the produce of the property is not sufficient to defray the expenses of keeping it ;

(6) where the property may be in danger of being destroyed ;

(7) where it has been usurped, and the guardian has reason to fear that there is no chance of fair restitution.

In one case[1] the Judicial Committee of the Privy Council upheld a sale by the father for the purpose of putting an end to pending litigation.

The circumstances which would justify a sale by a *near* guardian would justify a sale by a *remote* guardian with the sanction of the ruling authority, *i.e.*, the Court.[2]

Although the Mahomedan law does not contemplate the case of a mortgage, a mortgage or other incumbrance will be governed by the same rules as those which govern sales.[3]

Moveable property.

Every contract entered into by a *near* guardian on behalf, and for the benefit, of his ward, and every contract entered into by a minor with the consent of his *near* guardian, is valid and binding upon him, as far as regards his personal property, provided there be no unfair dealing or fraud,[4] but contracts by a minor independently of his guardian would only be binding under the same circumstances as in the case of other minors.[5]

N.-W. P. W. N., 1894, p. 89 ; *Kali Dutt Jha* v. *Abdul Ali*, I. L. R., 16 Calc., 627 ; L. R., 16 I. A., 96.

[1] *Kali Dutt Jha* v. *Abdul Ali*, I. L. R., 16 Calc., 627 ; L. R., 16 I. A., 96.

[2] *Husein* v. *Zia-ul-Nissa*, 1, L. R., 6 Bom.,467. Neither the Mahomedan nor the Hindu law restricts the powers of the Court (*post*, chap. xxiv) to direct a sale in a suit, or to permit a sale by a guardian appointed by it.

[3] *Hurbai* v. *Hiraji Byramji Shamji*, I. L. R., 20 Bom., 116. In *Hiraj Bakhsh* v. *Hamid Ali*, I. L. R., 9 All., 340, the minor's estate had received benefits from the transaction, which was therefore supported; see *Bishnath Singh* v. *Ashrafunnissa*, N.-W. P. W. N., 1894, p. 89.

[4] Macnaghten's Principles of Mahomedan Law, chap. viii, princ. 15 ; *Syedun* v. *Velayet Ali Khan*, 17 W. R. C. R., 239.

[5] As to contracts by minors, see *ante*, chap. ii.

Burden of proof.

The rules as laid down in *Hunooman Pershad Pandey's* case [1] with respect to the duty of a purchaser or mortgagee from the guardian of a minor's estate as to enquiry, and with respect to the burden of proving that enquiry, would apply equally where the minor is a Mahomedan.[2] That particular portion of the judgment of the Judicial Committee is based rather upon the general law affecting the disability of minority than upon the Hindu law particularly.

Recital of necessity in deed.

In the case of Hindus and Mahomedans alike, the deed by which the guardian deals with his ward's property need not contain any recital of the necessity on account of which the property is sold,[3] but it is always better to recite the circumstances of necessity. A recital of the necessity is by itself not sufficient evidence of necessity ;[4] but it may be some evidence of the representations made at the time.[5]

Description of vendor.

Although it is desirable that he should do so, it is not material whether the guardian or manager describes himself as such in the instrument of sale, provided it be clear from the terms of the instrument and from the surrounding circumstances that it is the property of the minor which is being sold.[6]

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[1] *Ante*, p. 170.

[2] See *Denobundo Pundit* v. *Mohamed Hossein*, 2 Hay, 549 ; *Kalenarain Roy Chowdhry* v. *Ram Coomar Chand*, W. R., 1864, C. R., 99.

[3] *Womes Chunder Sircar* v. *Digumburee*, 3 W. R. C. R., 154.

[4] *Rajlakhi* v. *Gokool Chandra Chowdry*, 13 Moo. I. A., 209 ; 3 B. L. R., P. C., 57 ; 12 W. R., P. C., 47 ; *Makundi* v. *Sarabsukh*, I. L. R., 6 All., 417. In *Kali Dutt Jha* v. *Abdul Ali*, I. L. R., 16 Calc., 627 ; L. R., 16 I. A., 96, evidence was allowed to be given of the real nature of the sale in spite of an incorrect recital in the deed of sale.

[5] *Ante*, p. 174.

[6] *Hukooman Pershad Pandey* v. *Babooee Munraj Koonweree*, 6 Moo. I. A. at p. 412 ; 18 W. R. C. R., note to p. 81 ; *Makundi* v. *Sarabsukh*, I. L. R., 6 All., 417 ; *Judoonath Chuckerbutty* v. *Tweedie*, 11 W. R. C. R., 20 ; *Gopee Mohun Takoor* v. *Radhanath*, 2 Knapp's P. C. Rep., 228 ; *Succaram Morarji* v. *Kalidas Kalianji*, I. L. R., 18 Bom., 631 ; *Murari* v. *Tayana*, I. L. R., 20 Bom., 286 ; *Watson* v. *Shamlal Mitter*, I. L. R., 15 Calc., 8 ; L. R., 14 I. A., 178 ; see *Netye Roy* v. *Odeet Roy*, 10 W. R. C. R., 241 ; *Bahur Ali* v. *Sookeea*, 13 W. R. C. R., 63 ; and *ante*, p. 153.

Registration.

It has been held that when a deed has been executed by a guardian for himself and for his ward, registration by the guardian alone is not sufficient.[1]

Specific performance of agreement by guardian.

Although a guardian may have power to sell or mortgage the estate of his ward, the Court will not decree specific performance of an agreement for such sale or mortgage unless it be quite certain that the agreement was for the benefit of the minor, that it will be for his benefit that it should be enforced, and that it be one which would be impossible for him to avoid on attaining majority.[2]

Sale not under Hindu or Mahomedan law.

The law applicable to persons other than Hindus and Mahomedans does not permit guardians, other than those appointed by the Court,[3] or having power given to them by the instrument appointing them, to sell or charge the immoveable property of their wards. Where it be necessary in the interests of minors, to whom the Hindu and Mahomedan laws have no application, to sell or charge their immoveable property the best course is to apply it for the appointment of guardian,[4] and on such appointment being made to obtain the sanction of the Court to the sale.[5]

Power of trustee.

A trustee, to whom power to sell is given by the document creating the trust, may, whether he be a guardian or not, exercise such power independently of the Court, and can give a valid receipt for the purchase-money.[6]

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[1] *Shankar Das* v. *Jograj*, I. L. R., 5 All., 599. In that case the Court acted upon the decision of the Privy Council in *Muhammad Ewaz* v. *Birj Lall*, I. L. R., 1 All., 465; L. R., 4 I. A., 166; but that decision, it is submitted, would not be in point where the guardian, and not the minor, is the executant. See Act III of 1877, sec. 3, definition of "representative."

[2] *Jugul Kishori* v. *Anundalal*, I. L. R., 22 Calc., 545; *Krishnasami* v. *Sundarappayyar*, I. L. R., 18 Mad., 415.

[3] As to the powers of guardians appointed by the Court, see *ante*, pp. 155 to 158.

[4] *Ante*, chaps. xi and xiv.

[5] *Ante*, pp. 155 and 160. A guardian appointed by a High Court under its Charter (*ante*, chap. xiv) must also obtain the sanction of that Court to a sale or charge. The Court would also have power in certain cases to order the sale of the minor's property, see *post*, chap. xxiv.

[6] *Sowarsby* v. *Lacy*, 4 Maddocks, 142.

Alienation not void.

An alienation by a guardian, which does not bind the minor, is not void, but voidable at the instance of the ward.[1] Subject to the repayment of such money as he may have obtained the benefit of,[2] the minor is entitled, before or, after attaining his majority, to recover such of his property as by the wrongful or unauthorised act of his guardian has come into the hands of other persons.

Charge for money expended for benefit of minor.

When in consequence of the absence of necessity or for any other defect in the power of the person acting for the minor, the Court is unable to give effect to a sale or mortgage, the person who advanced the money is entitled to a charge upon the property for such money as may have actually been applied for the benefit of the minor, or of which the minor has in any way obtained the benefit,[3] provided that the object of the debt was a legitimate one.[4]

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[1] *Prosunnanath Roy Chowdhry* v. *Afzoolonessa*, I. L. R., 4 Calc., 523.

[2] *Post*, chap. xxi.

[3] *Husmat Rai* v. *Sunder Das*, I. L. R., 11 Calc., 396; *Girraj Buksh* v. *Hamid Ali*, I. L. R., 9 All., 340; *Sorut Chunder Chatterjee* v. *Ashutosh Chatterjee*, 24 W. R. C. R., 46; s. c., *Shurrut Chunder* v. *Rajkissen Mookerjee*, 15 B. L. R., 350; *Hamir Singh* v. *Zakia*, I. L. R., 1 All., 57; *Modhoo Dyal Singh* v. *Golbur Singh*, 9 W. R. C. R., 51; *Muthoora Doss* v. *Kanoo Beharee Singh*, 21 W. R. C. R., 287. Act IX of 1872, sec. 65, *ante*, p. 175.

[4] *Ranmal Singji* v. *Vadilal Vakatchand*, I. L. R., 20 Bom., 61.

CHAPTER XVIII.

Powers of Guardians of Property (*continued*).

Covenant or promise by guardian to pay money.

Although a guardian may under certain circumstances sell or charge his ward's property, he cannot bind his ward personally by a covenant, or by any promise to pay money or damages,[1] nor can he bind his ward's estate except by a document purporting to bind it.[2]

Repairs.

A guardian may lay out money belonging to his ward in repairing the ward's houses or in otherwise preserving his estate.

Payment of debts.

He may, and should, pay all debts, for which the ward or his estate are liable,[3] including those which are charged upon the estate.[4]

Pre-emption.

A guardian can exercise a right of pre-emption on behalf of his ward, provided there be funds belonging to his ward available for the purpose,[5] and he can accept or refuse an offer of a share in pursuance of such a right.[6]

Where the guardian has neither asserted a right nor accepted or refused the offer, there is nothing to prevent

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[1] *Waghela Rajsanji* v. *Masludin*, I. L. R., 11 Bom., 551 ; L. R., 14 I. A., 89 ; *Indur Chunder Singh* v. *Radhakishore Ghose*, I. L. R., 19 Calc., 507 ; L. R., 19 I. A., 90 ; *Ranmal Singji* v. *Vadilal Vakhatchand*, I. L. R., 20 Bom., 61 : see also *Anon*, 1 Morl. Dig., 276 ; *Jowahir Singh* v. *Chunder Narain Rai*, 3 Sel. Rep., 83, 2nd Edn., 110, and *Neek Singh* v. *Anoopun Das*, 2 Sel. Rep., 154, 2nd Edn., 197. Where the promise is to pay money which has been expended for necessaries the minor may be liable, not on the promise but because the money has been supplied : see *Sundararaja Ayyangar* v. *Pattanathusami Tevar*, I. L. R., 17 Mad., 306 ; Act IX of 1872, sec. 68, *ante*, pp. 19 to 23.

[2] *Ranmal Singji* v. *Vadilal Vakhatchand*, I. L. R., 20 Bom., 61.

[3] *Ante*, pp. 137 and 138.

[4] Act IV of 1882, sec. 91.

[5] *Nubo Kant Doss* v. *Abdool Juleel*, 20 W. R. C. R., 372 ; *Lal Bahadoor Singh* v. *Durga Singh*, I. L. R., 3 All., 437.

[6] *Lal Bahadoor Singh* v. *Durga Singh*, I. L. R., 3 All., 437.

the minor on his attaining majority insisting on his right to pre-emption.[1]

Investments.

He may, if it be for the benefit of his ward, invest money belonging to the ward in the purchase of immoveable or other property ; but he is not entitled to mortgage or sell the lands of his ward for that purpose.[2]

Except the general provision in sec. 27 of the Guardians' and Wards' Act,[3] there is no statutory restriction upon the powers of a guardian to invest the money of his wards. If he be appointed by an instrument he must strictly follow the directions (if any) in that behalf contained in the instrument appointing him. If he has been appointed by a Court he should, in case of any doubt, apply for the directions of the Court. He must be careful to avoid any hazardous or speculative investment,[4] and would generally be acting the safer part, if he invest only in such securities as a trustee would be justified in investing in.[5]

Power of guardian to grant leases.

A guardian would have power to grant such leases as would be necessary for the ordinary and proper management of the estate.[6] The powers of the manager might depend upon what form of management is usual in the

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[1] *Lal Bahadoor Singh* v. *Durga Singh*, I. L. R., 3 All., 437.

[2] *Nubo Kant Doss* v. *Abdool Juleel*, 20 W. R. C. R., 372.

[3] *Ante*, p. 151.

[4] As to the liability of the guardian, see *post*, chap. xix.

[5] Although the Indian Trusts Act (II of 1882) is not of authority in this respect it may be a useful guide. Sec. 20 of that Act permits trustees to invest.

(*a*) in Promissory notes, debentures, stock or other securities of the Government of India, or of the United Kingdom of Great Britain or Ireland ;

(*b*) in bonds, debentures, and annuities charged by the Imperial Parliament on the revenues of India ;

(*c*) stock, or debentures of, or shares in, railway or other companies, the interest whereon is guaranteed by the Secretary of State for India in Council ;

(*d*) debentures or other securities for money issued by, or on behalf of, any Municipal body under the authority of any Act of a Legislature established in British India ;

(*e*) on a first mortgage of immoveable property situate in British India : provided that the property is not a leasehold for a term of years and that the value of the property exceeds by one third, or if consisting of buildings, exceeds by one-half, the mortgage money.

[6] Act VIII of 1890, sec. 27, *ante*, p. 151. See *Mangola* v. *Dinanath Bose*, 4 B. L. R. O. C., 72; 12 W. R. O. C., 35.

particular estate ; but he would not be justified in granting a permanent or long lease,[1] except under circumstances which would justify the sale or mortgage of the estate.[2] Where he does grant such lease, and the necessity or benefit of the minor does not justify the grant, the lease would enure until the expiration of the ward's minority, when it would be voidable by the ward.

As to leases by guardians appointed by the Civil Court, see *ante*, p. 155.

As to leases by managers under the Courts of Wards see *post*, Chaps. XXXII, XXXIV, and XXXV.

Acceptance of lease.

A minor is not bound by the covenants for payment of rent contained in a lease which has been accepted by his guardian on his behalf,[3] but he may be bound by an arrangement for the payment of enhanced rent, which could have been enforced by suit.[4]

Surrender and renewal of leases in which minors are interested.

In cases governed by the English law,[5] as administered by the High Courts in the exercise of their original jurisdiction, where a minor is entitled to any lease of property within the limits of such original jurisdiction made for the life or lives of one or more person or persons, or for any term of years, either absolute or determinable upon the death of one or more person or persons, or otherwise, he or his guardian or other person on his behalf may apply to the High Court by petition or motion in a summary way ; and by the order and direction of the Court, he or his guardian, or any person appointed in the place of such guardian by the Court, may be enabled from time to time, by deed or deeds, to surrender such lease, and accept and take, in the place and for the benefit of such minor, one

[1] *Gopeenath* v. *Ramjeewun Lall*, 15 Ben. S. D. A. Rep., 913 ; *Bungo Chunder Bose* v. *Ruheemoollah*, 1 W. R. C. R., 211.

[2] *Oddayto Chunder Koondoo* v. *Prosunno Coomar Bhuttacharjee*, 2 W. R. C. R., 325 ; *Nubokishen Mookerjee* v. *Kalee Pershad Roy*, 15 Ben. S. D.A. 607. It was held in *Bulwunt* v. *Chutter*, N.-W. P. H. C., 25th March 1870, that a guardian could not give a lease for 28 years.

[3] *Indur Chunder Singh* v. *Radhakishore Ghose*, I. L. R., 19 Calc., 507 ; L. R., 19 I. A., 90. See *Waghela Rajsanji* v. *Masludin*, I. L. R., 11 Bom., 551; L. R., 14 I. A., 89.

[4] *Watson* v. *Shamlal Mitter*, I. L. R., 15 Calc., 8 ; L. R., 14 I. A., 178.

[5] *Ante*, p. 39, note 5.

or more new lease or leases of the premises comprised in such lease so surrendered, for and during such number of lives, or for such term or terms of years determinable upon such number of lives, or for such term of years absolute, as was mentioned or contained in the lease so surrendered at the making thereof, or otherwise, as the Court may direct.[1]

Charges attending renewal.

Every sum of money and other consideration paid by any guardian or other person as a fine, premium, or income, or in the nature of a fine, premium, or income, for the renewal of any such lease, and all reasonable charges incident thereto, shall be paid out of the estate or effects of the minor for whose benefit the lease is renewed, or shall be a charge upon the leasehold premises, together with interest for the same, as the Court shall direct or determine.[2]

New leases to be to the same uses.

Every lease so renewed shall operate and be to the same uses, and be liable to the same trusts, charges, incumbrances, dispositions, devises, and conditions, as the lease so surrendered was or would have been subject to in case such surrender had not been made.[3]

Minors empowered to grant renewal of leases.

Where the minor might, in pursuance of any covenant or agreement, if not under disability, be compelled to renew any lease made for the life or lives of one or more person or persons, or for any term or number of years absolute or determinable on the death of one or more person or persons, he or his guardian in his name may, by the direction of the Court, to be signified by an order to be made in a summary way upon the petition of the minor or his guardian, or of any person entitled to such renewal, from time to time accept of a surrender of such lease, and make and execute a new lease of the premises comprised in such lease, for and during such number of lives, or for such term or terms of years absolute, as was or

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[1] See Act XXIV of 1841, secs. 1 and 5, extending 11 Geo. IV and 1 Will. IV, cap. LXV, to cases governed by the English law within the jurisdiction of the Supreme Court.

[2] *Ibid.*

[3] *Ibid.*

were mentioned in the lease so surrendered at the making thereof or otherwise as the Court by such order shall direct.[1]

Court may authorize leases by minors.

The Court may also authorize such minors or their guardians to make leases of lands belonging to such minors when it is for the benefit of the estate.[2]

Receipt of debts.

A guardian can receive payment of and give valid discharges for debts or other moneys due to his ward.[3] Payment to the minor will not discharge the debtor, but if by the purchase of necessaries or otherwise the minor has received benefits by the payment he will not afterwards be entitled to repudiate it.[4]

Settlement of accounts.

Unless it be for the benefit of his ward a guardian cannot settle or state an account or acknowledge a debt on behalf of his ward.[5]

Trade.

Except in the case of an ancestral trade, or there be a power in the instrument appointing him, a guardian cannot, without the sanction of the Court, embark in or carry on a trade on behalf of his ward.

Joint family.

A manager of a joint Hindu family may do all that is necessary for the material existence of the undivided family, or for the preservation of the family property.[6]

Liability of members of joint Hindu family for debts contracted during minority.

In the Bombay Presidency there is an express enactment protecting members of joint Hindu families from personal liability for family debts incurred while they were unborn, or before they attained the age of twenty-one years. They are liable after that age for such debts

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[1] Act XXIV of 1841, secs. 1 and 5, extending 11 Geo. IV and 1 Will. IV, cap. LXV, to cases governed by the English law within the jurisdiction of the Supreme Court.

[2] See 11 Geo. IV and 1 Will. IV, cap. LXV, sec. 17, extended by Act XXIV of 1841 to cases governed by the English law within the jurisdiction of the Supreme Court.

[3] *Motee Ram Sahoo* v. *Khuleel-oollah*, 2 Agra H. C. Rep., 338. In this case a receipt given before the certificate was granted, was upheld. As to the payment of legacies see *ante*, pp. 32 and 33.

[4] See *post*, chap. xxi.

[5] *Azuddin Hossain* v. *Lloyd*, 13 C. L. R., 112. As to the effect of an acknowledgment by a guardian on the limitation of suits, see *post*, chap. xxviii. As to admissions in suits see *post*, chap. xxv.

[6] *Ramlal Thakursidas* v. *Lakmichand Muniram*, 1 Bom. H. C. Rep., App., 51.

to the extent of family property come to their hands and not duly applied by them.[1]

It has been held[2] that a minor is not liable to be sued for simple contract debts entered into by the manager.

Ancestral trade.

Where a minor is a member of a joint family, and as such entitled to a share in an ancestral trade, the manager of the family can, so long as it be beneficial to the minor, continue the trade on the minor's behalf. Minor members of the family are bound by the acts of the manager which are necessarily incident to, and flowing out of, the carrying on of such trade,[3] including loans contracted for the purposes of the trade.[4]

The minor partner cannot be made personally liable, but his estate is liable to the extent of the partnership property,[5] *i.e.*, the property which is used by the family for the purposes of the trade or which has been acquired out of the profits thereof.[6]

A compromise between co-partners of partnership accounts and differences by a transfer and division of partnership property must be shown clearly to be of benefit to the minor before the compromise will be enforced.[7]

As soon as he sees that the interests of his ward are likely to be prejudiced by his property remaining in the trade, it becomes the duty of the guardian to take steps to effect the withdrawal of the ward's property from the partnership.

Compromises by guardians.

Where a guardian compromises the claims of his ward,[8] such compromise will not be upheld except on proof of

[1] Act VII (Bo. C.) of 1866, sec. 5.

[2] *Radhanath Mookerjee* v. *Muthoormohun Roy*, unreported appeal from Original Side, Calcutta, No. 48 of 1881.

[3] *Ramlal Thakursidas* v. *Lakmichand Muniram*, 1 Bom. H. C. Rep., App. 51, followed in *Johurra* v. *Sreegopal Misser*, I. L. R., 1 Calc., 470; *Rampartab Samrathrai* v. *Foolibai*, I. L. R., 20 Bom., 767. As to the liability of a minor partner, see Act IX of 1872, secs. 247, 248, *ante*, p. 23.

[4] *Premchand Bauthra* v. *Radhica Lall Roy*, 1 Shome's Law Reporter, 1.

[5] *Joykisto Cowar* v. *Nittyanund Nundy*, I. L. R., 3 Calc., 738; 2 C. L. R., 440.

[6] *Johurra* v. *Sreegopal Misser*, I. L. R., 1 Calc., 470.

[7] *Ramlal Thakursidas* v. *Lakmichand Muniram*, 1. Bom. H. C. Rep., App. 51.

[8] As to the compromise of suits, see *post*, chap. xxv.

necessity, or of clear benefit to the ward.[1] The compromise must be made in good faith,[2] and be free from fraud.

Where the compromise operates to assign immoveable property of the ward, the guardian, if appointed by the Court, must obtain the previous permission of the Court.[3]

Compromise by Court of Wards.

Under Bengal Act IV of 1870, the Court of Wards in Bengal had express powers to compromise claims by or against its wards.[4] The present Act contains no such express powers, but the general powers[5] of the Court would be sufficient to cover any compromise (otherwise than in a suit)[6] properly entered into in the interest of the minor.[7] Similar powers are possessed by the other Courts of Wards.[8]

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[1] *Dharmaji Vaman* v. *Gurrav Shrinivas*, 10 Bom. H. C. Rep., 311; *Kedarnath Mookerjee* v. *Mathuranath Dutt*, 1 B. L. R. A. C., 17; 10 W. R. C. R., 59; s. c. on review *Mathuranath Dutt* v. *Kedarnath Mookerjee*, 2 B. L. R. A. C., 126; *Roshun Jehan* v *Enaet Hossein*, 5 W. R. C. R., 4; and W. R., 1864, C. R., 83; *Boodhmul* v. *Gowree Sunkur*, 4 W. R. C. R., 71; and 6 W. R. C. R., 16; *Roteekant Bose* v. *Nobinchunder Bose*, 2 Hay, 619; *Ramlal Thakursidas* v. *Lakhmi Chand Muniram*, 1 Bom. H. C. Rep., 2nd Edn., App. 51; *Gopeenath* v. *Ramjeewan Lall*, 15 Ben. S. D. A., 913; *Venkataraghava* v. *Rangamma*, I. L. R., 15 Mad., 498; *Nirvanaya* v. *Nirvanaya*, I. L. R., 9 Bom., 365; *Watson* v. *Shamlal Mitter*, I. L. R., 15 Calc., 8; L. R., 14 I. A., 178.

[2] See *Makbul Ali* v. *Masnad*, 3 B. L. R., A. C. J., 54.

[3] Act VIII of 1890, sec. 29, *ante*, p. 155; *Brijmohan Lal* v. *Ghasi Ram*, N.-W. P. W. N., 1891, p. 46.

[4] Sec. 73 of that Act provided as follows:—"It shall be lawful for the Court to submit to arbitration, or otherwise to compromise, any claim which may be made by or on behalf of or against any ward, and every such submission to arbitration or compromise shall have the same force and effect as if the ward were not subject to any disqualification, and had personally entered into such submission or compromise; and for the purpose of any such compromise, any conveyance executed by the Collector under the orders of the Court shall be valid to pass the estate and inheritance, right, title, and interest in the property therein comprised of the ward, and of all persons whom such ward, if not disqualified, could have bound by a conveyance made for the payment of the debts of the ancestor from whom such property descended."

[5] Act IX (B.C.) of 1879, secs. 14 and 18, *post*, chap. xxxi.

[6] As to the compromise of suits, see *post*, chap. xxv.

[7] See *Luchmeswar Singh* v. *Chairman, Darbhanga Municipality*, I. L. R., 18 Calc., 99; L. R., 17 I. A., 90.

[8] *Post*, chaps. xxxiv and xxxv.

Gift by guardian.

A guardian cannot give away a minor's property in charity or otherwise.[1] If he does so the minor can recover it back.[2]

Relinquishment of right.

He cannot waive or relinquish his ward's rights or claims[3] except for a due consideration, as in the case of a proper compromise.

Reference to arbitration.

A reference to arbitration made by a properly constituted guardian in good faith and for the benefit of a minor will be upheld.[4]

Partition.

It is not ordinarily in the interests of a minor member of a joint Hindu family, or of any other minor joint-owner that his share should be separated. *Primâ facie*, a partition is not for a minor's benefit, because, ordinarily speaking, the family estate is better managed, and yields a greater ratio of profit in union than when split up and distributed among the several parceners, and moreover, by partition, a minor member of a Mitakshara family would lose the benefit of survivorship.[5] Such special circumstances, as would render a suit for partition necessary in the interest of the minor, would justify a guardian in arranging a partition.[6]

Where an adult co-sharer insists upon partition the guardian cannot resist it; but must do his best in the interests of the minor.

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[1] *Luchmeswar Singh* v. *Chairman, Darbhanga Municipality*, I. L. R., 18 Calc., 99; L. R., 17 I. A., 90.

[2] *Mahadaji Parashram* v. *Balaji Sitaram*, Bombay Printed Judgments, 1882, 267.

[3] *Ibid*; *Luchmeswar Singh* v. *Chairman, Darbhanga Municipality*, I. L. R., 18 Calc., 99; L. R., 17 I. A., 90. A guardian cannot revoke or repudiate a trust of which his ward is a beneficiary. This can only be done by the ward on attaining majority; see Act II of 1882, sec. 78, which is in accordance with the general law.

[4] See *Romonkissen Sett* v. *Hurrololl Sett*, I. L. R., 19 Calc., 334; *Temmakal* v. *Subbammal*, 2 Mad. H. C. Rep., 47; *Ramnarain Poramanick* v. *Sreemutty*, 1 W. R. C. R., 281.

[5] *Thangam Pillai* v. *Suppa Pillai*, I. L. R., 12 Mad., 401; *Parvathi* v. *Manjaya Karantha*, 5 Mad. H. C. Rep., 193; *Kamakshi Ammal* v. *Chidambara Reddi*, 3 Mad. H. C. Rep., 94; *Alimelammal* v. *Arunachelam Pillai*, 3 Mad. H. C. Rep., 69; *Nallappa Reddi* v. *Balammal*, 2 Mad. H. C. Rep., 182. Macnaghten's Hindu Law, vol. ii, chap. i, sec. 1, case x. Mayne's Hindu Law, 5th Edn., p. 536.

[6] *Ante*, p. 136, West and Bühler, 2nd Edn., p. 303.

A partition by arbitration,[1] or by arrangement,[2] or by the Collector[3] is binding on a minor, provided that he be not injuriously affected thereby, that it be fair, and that the person representing him in such proceedings act *bonâ fide* and with a due regard to his interest.[4]

Shares in limited companies.

Although shares in limited companies may be dealt with by a guardian in the same way as other moveable property of his ward, the Court would not be inclined to compel the registration of a transfer by the guardian,[5] except it be perfectly clear that the minor cannot repudiate the transfer.[6] The power of a guardian to vote for his ward at meetings of a company depends upon the articles of association of the company.[7]

Power to vote.

Shares in Presidency Banks.

Where the ward is a proprietor or shareholder in a Presidency Bank his guardian may vote for him.[8]

Letters of Administration, &c.

As to the powers of a guardian to apply for letters of administration or succession certificates, see *ante*, pp. 35 and 36.

Distress.

A guardian can exercise the powers of distress given by the North-Western Provinces Rent Act.[9] Under the Bengal Tenancy Act he can in the name of his ward apply for distraint.[10]

Hereditary offices in Bombay.

In the Bombay Presidency when any head of a family or representative *wátândár*,[11] is under the age of eighteen years his guardian if not a female[12] may exercise all powers

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[1] *Ramnarain Poramanick* v. *Sreemutty*, 1 W. R. C. R., 281.

[2] *Deo Bunsee* v. *Dwarkanath*, 10 W. R. C. R., 273; s. c., *Deowanti* v. *Dwarkanath*, 8 B. L. R., 363 *note*.

[3] *Huree Pershad Jha* v. *Muddun Mohun Thakoor*, 8 B. L. R., Ap., 72; 17 W. R. C. R., 217.

[4] *Kalee Sunkur Sannyal* v. *Denendro Nath Sannyal*, 3 W. R. C. R., 68; *Lal Bahadur Singh* v. *Sirpal Singh*, I. L. R., 14 All., 498; *Krishnabai* v. *Khangowda*, I. L. R., 18 Bom., 197; *Chanvirapa* v. *Danava*, I. L. R., 19 Bom., 593; *Nallapa Reddi* v. *Balammal*, 2 Mad. H. C. Rep., 182; *Lakshmibai* v. *Gunpat Moroba*, 4 Bom H. C. Rep., 150. West and Bühler, 2nd Edn., 303, 384, 386.

[5] *See* Act VI of 1882, sec. 58.

[6] As for instance in the case of a transfer by a guardian appointed by the Court, or having authority by the deed appointing him.

[7] In companies which have adopted Table A, the guardian may vote. *See* Act VI of 1882, Table A, Art. 45.

[8] Act XI of 1876, sec. 58.

[9] Act XII of 1881, secs. 56, 57 and 59.

[10] Act VIII of 1885, sec. 121.

[11] For definitions of "Head of Family," "Wátândár" and "Guardian," *see* Act III (Bo. C.) of 1874, sec. 4.

[12] Act III (Bo. C.) of 1874, sec. 51.

and perform all duties conferred and imposed by Bombay Act III of 1874.[1]

Adoption by wátándár.

In case of the registered representative *wátándár*, or his widow, adopting an heir the guardian of the heir should, on the death of the *wátándár* or widow, report the adoption to the Collector.[2]

Election of patel.

The guardian of a *matadar* who is under eighteen years of age may act on his behalf in an election to the office of *patel*.[3]

Settlement of mehal (N.-W. P.)

The settlement of a mehal under the Land Revenue (N.-W. P.) Act, must be made with the guardian or manager of a minor.[4]

Bengal Drainage Act.

The right to vote under the Bengal Drainage Act may be exercised by a manager appointed by the Court of Wards or by the Civil Court, or, where no such manager has been appointed, by any person who, in the opinion of the Commissioners, duly represents the interests of the minor.[5]

Right of survivorship among joint guardians.

On the death of one of two or more joint guardians, the guardianship continues to the survivor or survivors until a further appointment be made by the Court.[6]

Cessation of authority of guardian.

The powers of a guardian of the property cease—

(*a*) by his death, removal or discharge ;

(*b*) by the Court of Wards assuming superintendence of the property of the ward ; or

(*c*) by the ward ceasing to be a minor.[7]

They also cease on the death of the ward.

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[1] *See* sec. 37 as amended by Act III (Bo. C.) of 1886. This Act does not apply to Matadars in the districts of Ahmedabad, Kaira, Broach and Surat, and in villages in the Panch Mahals district to which Act VI (Bo. C.) of 1887 has been applied. Act VI (Bo. C.) of 1887 sec. 1.

[2] Act III (Bo. C.) of 1874, sec. 34.

[3] Act VI (Bo. C.) of 1887, sec. 23.

[4] Act XIX of 1873, sec. 43.

[5] Act VI (B. C.) of 1880, sec. 16 (2).

[6] Act VIII of 1890, sec. 38.

[7] *Ibid*, sec. 41 (2). See also sec. 4(1).

CHAPTER XIX.

Liabilities of Guardians.

Liability to Ward.

As in the case of any other trustee a guardian's liabilities are measured by his duties.[1] Liability to ward.

Every plain neglect of duty by him amounts to a breach of trust, and he must compensate his ward for any loss occasioned thereby.[2] For breach of duty.

He is liable to his ward for loss sustained by an improper or hazardous investment of the ward's money.[3] Loss by investment.

A ward can either during his minority (by a next friend), or after he has attained his majority, sue his guardian for damages for the waste, malversation, or maladministration of his estate,[4] or for negligence in the management thereof,[5] or in the conduct of suits.[6] Liability for waste, &c.

Where a guardian, by availing himself of his character as such, gains for himself any advantage, or where he enters into dealings under circumstances in which his Advantage gained by guardian.

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[1] As to the duties of a guardian, see *ante*, chapter xv.

[2] *Issur Chander Rai* v. *Ragub Indernarain*, 16 Beng. S. D. A., 349; s. c. on review at p. 611.

[3] *Fletcher* v. *Walker*, 3 Maddock, 73. As to investment see *ante*, pp. 138 and 182.

[4] *Lakhi Prya* v. *Nobin Chandra Nag*, 3 B. L. R. A. C., 37; 11 W. R. C. R., 370; *Alimelammal* v. *Arunachellam Pillai*, 3 Mad. H. C. Reps., 69; *Ujoodhya Persaud Narain Singh* v. *Collector of Sarun*, 7 Beng. S. D. A., 370; *Taruck Chunder Sen* v. *Doorga Churn Sen*, 20 W. R. C. R., 2.

[5] *Gopeenath* v. *Ramjeewun Lall*, 15 Beng. S. D. A., 913; *Ujoodhya Persaud Narain Singh* v. *Collector of Sarun*, 7 Beng. S. D. A., 370.

[6] *Issur Chander Rai* v. *Ragub Indernarain*, 16 Beng. S. D. A., 349; s. c. on review at page 611. As to the rights of a minor against his guardian, who, by not commencing a suit, has allowed a claim to be barred by limitation, see *Taruck Chunder Sen* v. *Doorga Churn Sen*, 20 W. R. C. R., 2.

own interests are, or may be, adverse to those of the ward and thereby gains for himself an advantage, he must hold the advantage so gained for the benefit of the ward.[1] He may be required to account to his ward for property obtained by him in a suit, which was maintained in his own name, but in fact for the minor.[2]

Injunction against guardian.

A guardian, can at any time be compelled by a suit to perform his duty, or be restrained from committing a breach of trust; but a ward has no summary remedy against his guardian except that he can compel him on the termination of his guardianship to deliver up property and accounts in his possession.[3]

Account against guardian during minority.

A minor can, at any time during his minority,[4] require his guardian[5] to account to him for his dealings with his property,[6] and should his guardian unreasonably neglect or refuse so to do, or should there be any suspected mismanagement of the property, he can by a next friend[7] sue the guardian for an account.[8] A wrongful refusal or neglect to account might also justify an application for the removal of a guardian appointed by the Court.[9]

Suit against guardian where administration-bond is taken.

Where a guardian appointed or declared by a Civil Court under the Guardians' and Wards' Act has given a bond duly to account for what he may receive in respect

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[1] See Act II of 1882, sec. 88, illus. (*h*).

[2] *Dhurm Das Pandey* v. *Shamasoondri*, 3 Moo. I. A. 229; 6 W. R. P. C., 43.

[3] Act VIII of 1890, sec. 41 (3), *post*, pp. 194 and 195.

[4] As to his right to an account on attaining majority, see *post*, p. 195.

[5] This would include the manager of a joint family or any other person having charge of the property of a minor; *Abhoya Chandra Roy Chowdhoory* v. *Pyarimohun Guho*, 5 B. L. R., 347; 13 W. R. F. B., 75; *Chuckun Lall Singh* v. *Poran Chunder Singh*, 9 W. R. C. R., 483. As to the nature of the account to be rendered to a minor member by the manager of a joint family, see *Damodar Das Maneklal* v. *Uttamram Maneklal*, I. L. R., 17 Bom., 271. West and Bühler, 2nd Edn., p. 350.

[6] *Cary* v. *Bertie*, 2 Vernon, 342.

[7] As to the procedure in suits by minors see *post*, chap. xxv.

[8] The guardian would, in cases where he has acted properly, be entitled to his costs of a suit for an account, and the next friend of a minor suing his guardian for an account may be made personally liable for the costs of such suit, when it appears that the charges of mismanagement, on which it is based, are unfounded (se e Act XIV of 1882 sec. 440, *post*, chap. xxvi.)

[9] *Ante*, p. 109.

of the property of his ward,[1] the Court may, on application made by petition and on being satisfied that the engagement of the bond has not been kept, and upon such terms as to security, or providing that any money received be paid into the Court, or otherwise as the Court thinks fit, assign the bond to some proper person, who shall thereupon be entitled to sue on the bond in his own name as if the bond had been originally given to him instead of to the Judge of the Court, and shall be entitled to recover thereon as trustee for the ward, in respect of any breach thereof.[2] Where the amount of this bond is not sufficient to cover the liability, the guardian would remain liable, but the suit for the amount not covered by the bond would have to be brought in the name of the minor, or after his death by his representative.[3]

Suit against guardian where administration-bond not taken.

Where a guardian appointed or declared by the Court has not given such bond any person, with the leave of the Court, may as next friend, at any time during the continuance of the minority of the ward, and upon such terms as in the case where a bond is taken, institute a suit against the guardian,[4] or, in case of his death, against his representative, for an account of what the guardian has received in respect of the property of the ward, and may recover in the suit, as trustee for the ward, such amount as may be found to be payable by the guardian or his representative, as the case may be.[5]

[1] This would include the balance actually in hand at the time of the appointment or declaration, but the Court cannot in a suit on the bond open up the accounts of previous years in order to ascertain the balance which the guardian ought to have had at the time of his office being recognised by the Court; see Appeal 9 and 10 of 1875, Bombay Printed Judgments 1877. As to a suit for the purpose of taking previous accounts see *ante* p. 192.

[2] Act VIII of 1890, sec. 35. Without the assignment no person, other than the judge to whom the bond is given, can sue on it; *Amurnath* v. *Thakur Doss*, I. L. R., 5 All., 248. On the minor's attaining majority the judge may assign the bond to him. It may be assigned to his representative after his death.

[3] See Act VIII of 1890, sec. 36.

[4] This is subject to the provisions of sec. 440, Act XIV of 1882, as amended by sec. 53, Act VIII of 1890 (see post, chap. xxv), Act VIII of 1890, sec. 36 (2).

[5] Act VIII of 1890, sec. 36 (1). Although a suit cannot be brought

After attaining majority the ward can continue such suit in the same way as he can continue other suits instituted on his behalf.[1]

Court in which suits to be brought.

Such suits can be instituted in any Court having jurisdiction to try suits of a similar description against persons other than guardians appointed by the Court.[2]

General liability of guardian as trustee.

These provisions do not deprive a ward or his representative of any other remedy against his guardian, or the representative of the guardian, which any other beneficiary or his representative would have against his trustee or the representative of the trustee.[3] A minor on attaining majority, and the representative of a minor on the death of the minor can, apart from them, sue his guardian for an account.

Suit for account.

Delivery of property and accounts.

When for any cause the powers of a guardian cease,[4] the Court may require him or, if he is dead, his representative[5] to deliver as it directs any property in his possession or control belonging to the ward or any accounts in his possession or control relating to any past or present property of the ward.[6]

Discharge from liability.

When he has delivered the property or accounts as required by the Court, the Court may declare him to be discharged from his liabilities save as regards any fraud which may subsequently be discovered.[7]

Penalty for not complying with requisition.

If a person who has ceased to be a guardian, or the representative of such person, fails to deliver any property or accounts in compliance with the requisition of the Court, he is liable by order of the Court[8] to fine

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under this section after the death of the minor (*In the matter of Narmadabai*, I. L. R., 8 Bom., 14) the representative of the minor can sue for an account, *post*, p. 195.

[1] Act XIV of 1882, sec. 450, *post*, chap. xxv.

[2] There was a decision to the contrary effect under Act XX of 1864; *Uttamram Manikkal* v. *Damodhardas Manikkal*, 9 Bom. H. C. Rep., 39.

[3] Act VIII of 1890, sec. 37.

[4] *Ante*, pp. 150 and 190. This applies to the case of any guardian; see definition of guardian, *ante*, p. 55.

[5] *i.e.*, his executor or administrator, or in the absence of such representative the person succeeding to his property and obtaining possession of the property or accounts of the ward.

[6] Act VIII of 1890, sec. 41 (3).

[7] *Ibid*, sec. 41 (4).

[8] *i.e.*, the Court making the requisition.

not exceeding one hundred rupees, and in case of recusancy to further fine not exceeding ten rupees for each day[1] after the first during which the default continues, and not exceeding five hundred rupees in the aggregate, and to detention in the civil jail until he undertakes to deliver the property or accounts.[2]

If he is released from detention on giving such undertaking and fails to carry out the undertaking within the time allowed by the Court, the Court may cause him to be arrested and recommitted to the civil jail.[3]

The order inflicting a penalty[4] is appealable to the High Court.[5] Appeal.

This summary remedy only applies to property and accounts actually in the possession or under the control of the guardian. He cannot be thereby required to make up accounts or to explain them or to vouch them or to give any information on the subject of his dealings with the property.[6] Extent of summary remedy.

It is not clear what is the nature of the discharge which the Court is competent to give to a guardian under this provision. It is submitted that the discharge can extend only to the liability to deliver the property or accounts, and cannot affect the liability of the guardian to a suit for an account. Nature of discharge.

In addition to this remedy a ward on attaining majority, a new guardian in the name of the ward, or the ward's representative on the death of the ward, may by suit require a guardian[7] to account for his dealings with the property and to deliver such property as may belong to the ward, and such money as upon the taking of the accounts by the Court may be found to be due to him. Suit for an account after termination of guardianship.

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[1] *Ante*, p. 91, note 5.

[2] Act VIII of 1890, sec. 45.

[3] Act VIII of 1890, sec. 45.

[4] Whether of fine or imprisonment.

[5] Act VIII of 1890, sec. 47.

[6] *Cf.* Act XL of 1858, sec. 23, and Act XX of 1864, sec. 23. In the case where the ward claims more than the guardian admits, it might be necessary to take some sort of account, but in case of there being a *bonâ fide* dispute as to the accounts, it would generally be better to refer the parties to a suit.

[7] This includes the manager of a joint family or any other person having rightfully or wrongfully charge of a minor or his property: see *ante*, p. 192, note 5.

Costs of suit.

The Courts have discretion in allotting the costs of suits and must be guided by the circumstance of each case, bearing in mind the rule that the person responsible for the litigation is ordinarily liable for costs ; but in a suit of this nature a reasonable mode of dealing with the costs might ordinarily be to make the guardian liable for the costs incurred up to and including the interlocutory decree, which makes the order for an account, in cases where he had refused or unreasonably neglected or delayed to render a proper account to his ward. In other cases he might be allowed such costs.[1] The costs of taking the accounts by the Court and of the final decree, if any, might in most cases depend upon the result of the accounts. A guardian would ordinarily obtain the costs of an unsuccessful suit against him. Where both parties are to blame for the litigation or in the conduct of it, the Court may reasonably require each party to pay their cost of it, but in the absence of misconduct a guardian, like any other trustee, is entitled to his costs, charges and expenses[2] out of the ward's estate.

Limitation to suits by ward against guardian.

Although a suit against a guardian or his representatives for the purpose of following in his or their hands specific property belonging to the ward is not barred by any length of time,[3] a suit for an account (*i.e.*, to have an account taken and for payment of the balance to be found due) must be brought within six years from the termination of the guardianship,[4] and a suit to make good out of the general estate of a deceased guardian the loss occasioned by a breach of trust must be brought within three years

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[1] Either from the plaintiff, or if the ward be suing by next friend, from the next friend, or out of the ward's estate.

[2] One reason which should make a Court disinclined to deprive a guardian of his costs is that the greater the burdens placed upon the shoulders of guardians, the greater the difficulty in persuading competent persons to undertake the trust.

[3] Act XV of 1877, sec. 10 ; *Hurro Coomaree* v. *Tarini Churn Bysack*, I. L. R., 8 Calc., 766.

[4] Act XV of 1877, sch. ii, art. 120. *Saroda Persad Chattopadaya* v. *Brojonath Bhuttacharjee*, I. L. R., 5 Calc., 910 *Hurro Comaree* v. *Tarini Churn Bysack*, I. L. R., 8 Calc., 766.

from the date of the guardian's death, or if the loss has not then resulted the date of the loss.[1]

These periods are subject to an extension where the cause of action has arisen during the minority of the ward.[2]

A guardian, who dishonestly misappropriates or converts to his own use the property of his ward is liable to be punished by the criminal law.[3] Criminal breach of trust by guardian.

Liability to persons other than ward.

Although a person who has *bonâ fide* contracted with the guardian[4] of a minor may not be able to make his contract binding against the estate of the minor, he may sometimes, where he has been deceived, have a remedy against the guardian, who has contracted with him without authority.[5] Personal liability of guardian on contract.

When a guardian borrows money on his own credit he alone is liable, although the money may have been applied for the benefit of the ward.[6]

In the case of a sale by the guardian, which does not bind the ward, a purchaser, who has not been deceived, has no remedy against the guardian.[7] Where he has been deceived by the guardian and has acted *bonâ fide*, he

[1] Act XV of 1877, sch. ii, art. 98.

[2] *Post*, chap. xxviii.

[3] Act XLV of 1860, sec. 405. "Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust.'" Sec. 406. "Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

[4] As to how a question whether the contract is made on behalf of the minor must be determined, see *ante*, p. 153.

[5] *Ashruff Ali* v. *Mirza Quasim*, 3 Sel. Reps. 49, 2nd Edn., 65.

[6] *Gadgeppa Desai* v. *Apaji Jivanrao*, I. L. R., 3 Bom., 237.

[7] *Bhoopnarain Chowbey* v. *Rughoo Nath Gobind Roy*, 18 W. R. C. R., 230. See *Doorga Churn Bhuttacharjee* v. *Shosheebhoosun Mitter*, 5 W. R. S. C. C. Ref., 23; and *Azeemooddeen Ahmed* v. *Athur Ali*, 3 W. R. C. R., 137; *Ashrufooddeen Alee Khan* v. *Shamasoonderee*, 9 Beng. S. D. A., 531.

can recover from the guardian all that the ward has required him to give up.[1]

In an old case[2] a guardian was held to be responsible for all claims arising out of transactions during his management, and that to him, therefore, must claimants look for the satisfaction of their demands, and not to the minor whose estate he manages, but that the estate of the minor is responsible for all just debts incurred on account of such minor; and that his guardian, having rendered full and fair accounts, would be entitled to recover from the estate any sums that might appear to have been borrowed from necessity, and for the evident benefit of the minor. The principle of this case cannot now be carried out in its entirety[3] as in the case of necessaries supplied,[4] and other payments which bind the minor's estate, recourse may be had in the first instance to the minor's estate.

Contract of apprenticeship.

When a guardian enters into an agreement of apprenticeship[5] on behalf of his ward, and covenants with the master with respect to the service or behaviour of the ward, he is liable to be sued on such agreement, if the ward absents himself or neglects to perform his work.[6]

Marriage contract.

As to the liability of a guardian for breach of a contract of marriage entered into by him on behalf of his ward see *post*, Chapter XXIII.

Liability as occupier.

A guardian would also incur the ordinary liabilities incident to the occupation of land, and would be responsible for acts and omissions, for which an occupier would be liable.[7] He is also personally liable for any wrongful acts committed by him, even if they might have been done in the interests of the ward.[8]

Wrongs by guardian.

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[1] *Futteh Narain* v. *Deen Dyal Lall*, 15 W. R. C. R., 37.

[2] *Anon.*, 1 Morl. Dig., 276; see also *Jowahir Singh* v. *Chunder narain Rai*, 3 Sel. Reps. 83, 2nd Edn., 110; and *Neek Singh* v. *Anoopun Das*, 2 Sel Reps., 154, 2nd Edn., 197.

[3] See *Azeemooddeen Ahmed* v. *Ataur Ali* 3 W. R. C. R., 137.

[4] *Ante*, pp. 19 to 23.

[5] See Act XIX of 1850, *ante*, pp. 143, *et seq.*

[6] For form of plaint in such suit, see Act XIV of 1882, 4th schedule, No. 64.

[7] As to offences against the Salt laws, see *ante*, p. 138.

[8] *Gooroo Das Roy*, 1 Ben. S. D. A. Summary Cases, Part I, 16.

Liability under Municipal Acts.

If he has sufficient funds in his hands, he would be subject to the liabilities imposed upon owners of property by the several Municipal Acts.[1]

Wrongs by ward.

A guardian is not, as such, liable for damages for wrongful acts committed by his ward.[2]

Railway offences by children.

As to the liability of a father or guardian with respect to the commission by children of acts endangering the safety of persons travelling by railway, see Act IX of 1890, sec. 130, *ante*, p. 49.

Holding over after death of ward.

On the death of his ward a guardian is bound to make over to the next owner possession of the property held by him, and in case of his neglect is liable to be sued for possession and damages.[3]

Production of ward at instance of reversioner.

A High Court has power to compel a guardian who is within the limits of its ordinary original civil jurisdiction to produce his ward where an application is made by a reversioner stating that he has reason to believe that the minor is dead, and that the guardian is concealing such death.[4]

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[1] See Act III (B. C.) of 1884, sec. 6 (11); Act II (B. C.) of 1888, sec. 3, definition of "owner"; Act VI (Bo. C.) of 1873, sec. 3, definition of "owner"; Act III (Bo. C.) of 1888, sec. 3 (m); Act I (M. C.) of 1884, sec. 3 (t); Act IV (M. C.) of 1884, sec. 3 (xiii).

[2] *Luchmun Dass* v. *Narayan*, 3 N.-W. P. H. C. Rep., 191

[3] See 6 Anne, cap. 18, sec. 5; printed as 6 Anne, cap. 72, in 'Statutes relating to India."

[4] 6 Anne, cap. 18, printed as 6 Anne, cap. 72, in "Statutes relating to India."

CHAPTER XX.

MODES OF ENFORCING RIGHT TO CUSTODY OF PROPERTY AND PERSON OF MINOR.

Possession of property.

Except that he can obtain an order from the Court requiring a former guardian or his representative to deliver over property of the ward into his possession,[1] the only remedy available to a guardian who seeks to obtain possession of property belonging to his ward is by a suit in the name of his ward.

Custody of ward.

A guardian who desires to obtain or recover the custody of his ward may proceed either by suit[2] or by the summary remedies available to him. These summary remedies would ordinarily be more convenient and less expensive than a remedy by suit, but they are not meant to be used for the purpose of determining difficult questions of right, and, unless the welfare of the minor peremptorily demands the determination of such questions, the Court would be justified in abstaining from determining them.[3]

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[1] Act VIII of 1890, sec. 41 (3); *ante*, pp. 114, and 194.

[2] *Balmakund* v. *Janki*, I. L. R., 3 All., 403. The guardian would bring the suit in his own name. For recent examples of suits of this kind, see *Krishna* v. *Reade*, I. L. R., 9 Mad. 31, 391; *Venkamma* v. *Sarit-ramma*, I. L R., 12 Mad., 67; *Abasi* v. *Dunne*, I L. R., 1 A l., 598. Such suit can be brought in a District Munsiff's Court; *Krishna* v. *Reade*, I. L. R., 9 Mad, 31. It is not cognizable by a Provincial suit of Small Causes; Act IX of 1887, 2nd schedule (37). Except in the case of a suit for the recovery of a wife (Act XV of 1882, sec. 19 (r)), such a suit is not expressly excluded from the cognizance of a Presidency Small Cause Court, but it can scarcely be contemplated that such suit could be brought in a Small Cause Court

[3] In two cases (*Balmakund* v. *Janki*, I. L. R., 3 All. 403, and *Pakhandu* v. *Manki*, I. L. R., 3 All., 506) the Allahabad High Court declined to allow the question as to a husband's right to obtain the custody of his wife to be determined in a proceeding under Act IX of 1861. In the former case the marriage was

These remedies are—

1. By a proceeding under sec. 25 of the Guardians and Wards Act.

2. By a proceeding under sec. 491 of the Code of Criminal Procedure. Summary remedies.

3. In the case of a female child under 14 years of age by a proceeding under sec. 551 of the same Code.

4. In the case of children, the marriage of whose parents is the subject of a divorce suit, by an application under the Indian Divorce Act.

Where the fact of a person being guardian is disputed, as for instance, where he claims to be guardian under a will, and the *factum* of the will is denied, summary powers cannot be very conveniently exercised. The Court may, however, make an enquiry as to the right of guardianship of the minor.[1] Dispute as to guardianship.

Persons seeking the aid of the Court to obtain possession of minors may be put upon terms.[2] Applicants put upon terms.

The exercise of these summary powers does not interfere with the rights of guardians subsequently appointed, or with those of the Courts of Wards.

1. In addition to its powers to provide for the custody of a minor, pending the appointment of a guardian,[3] the District Court[4] having jurisdiction in the place where the ward for the time being ordinarily resides[5] can provide summarily for the custody of minors independently of any proceeding for the appointment of guardians, and whether such proceeding be pending or not. Guardians and Wards Act, sec. 25.

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denied. In the latter the wife pleaded that the husband was out of caste, and that she would lose her own caste if she resided with him. See per Broughton, J., *in the matter of Kashichunder Sen*, I. L. R., 8 Calc., 266; s. c., *Brohmomoyee* v. *Kashi Chunder Sen*, 10 C. L. R., 91.

[1] See *In re Andrews*, L. R., 8 Q. B., 160.

[2] In *Shridhar* v. *Hiralal Vithal*, I. L. R., 12 Bom. 480, where paternal relations were seeking possession of a girl in order to give her in marriage, provision was made in the order that the girl should not be married to a person living in a foreign territory, and should not be forced into marrying a person whom she did not like.

[3] See *ante*, p. 90.

[4] This includes a High Court in the exercise of its ordinary original civil jurisdiction; Act VIII of 1890, sec. 4 (4).

[5] Act VIII of 1890, sec. 4 (5).

Act IX of 1861.

Until the passing of the Guardians and Wards Act a right to the custody of minors outside the Presidency towns could be enforced either by suit or under Act IX of 1861, which provided a procedure for the summary determination of questions as to the right of guardianship.[1] Act IX of 1861 was repealed by the Guardians and Wards Act (VIII of 1890), sec. 25 of which is as follows :—

Guardians and Wards Act, sec. 25.

Title of guardian to custody of ward.

"(1) If a ward leaves or is removed from the custody of a guardian of his person the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

"(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by sec. 100 of the Code of Criminal Procedure, 1882."

Who is entitled to apply.

"Guardian" in sec. 25, as in the rest of the Act, means a person having the care of the person of the minor,[2] and includes not only a guardian appointed by the Court, but also a natural or testamentary guardian, and having regard to the principles upon which the Courts in India and in England have acted in the summary disposal of the custody of minors would include any person not wrongfully having the custody of the minor. Except pending the appointment of a guardian,[3] the Court has, under the Guardians and Wards Act, no summary power to remove a ward from the custody of his guardian even where the custody of the minor by the guardian is calculated to injure the minor. The remedy, in that case, is to apply for the appointment of a guardian and for an interlocutory order.

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[1] There was a difference of opinion as to whether that Act applied to European British subjects ; see *Shannon*, 2 N.-W. P. Rep., 79, and *In re Hutton*, 3 W. R. Rec. Ref., 5 ; but it is clear that the Guardians and Wards Act (VIII of 1890) applies to all classes of minors.

[2] Act VIII of 1890, sec. 4 (2).

[3] *Ante*, p. 90.

The Court can only act where it is for the welfare of the minor, but where the constituted guardian is fit for the trust it is ordinarily for the benefit of the minor that he should be restored to the custody of such guardian.

Powers limited to custody.

The powers conferred by this section upon the Court are limited to providing for the custody of the minor. The Court cannot thereunder provide for the maintenance, education or marriage[1] of a minor or deal with his property.

Procedure in application under sec. 25.

No special procedure is provided for the hearing of an application under sec. 25. The application would be by petition, and the Court can only make an order after due notice to the person in whose custody the minor is, and after hearing such person, if he wishes to be heard, and such evidence, if any, as he may produce. In making an order the Court can act only upon legal evidence.[2]

Penalty for disobeying order under sec. 25.

If a person having the custody of a minor fails to do his utmost to compel the minor to return to the custody of his guardian in obedience to an order under sec. 25, sub-sec. 1, he is liable by order of the Court to[3] fine not exceeding one hundred rupees, and in case of recusancy further fine not exceeding ten rupees for each day after the first during which the default continues,[4] and not exceeding five hundred rupees in the aggregate, and to detention in the civil jail until he undertakes to compel the minor's return. If a person who has been released from detention on giving such undertaking fails to carry out the undertaking within the time allowed by the Court,

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[1] It was held under Act IX of 1861, that the Court could decide the right to give in marriage; *In the matter of Kashi Chunder Sen*, I. L. R., 8 Calc., 266; s. c. *Brohmomoyee* v. *Kashi Chunder Sen*, 10 C. L. R., 91; but sec. 25 of the Guardians and Wards Act does not contain the word "guardianship" which was to be found in Act IX of 1861, sec. 3.

[2] This would include a report made by a Collector or a subordinate Court; Act VIII of 1890, sec. 46, *ante*, p. 115.

[3] *i.e.* the Court which made the order.

[4] See *ante*, p. 91, note 5.

the Court may cause him to be arrested, and recommitted to the civil jail.[1]

Appeals.

Orders imposing a penalty under this provision[2] and orders under sec. 25 making or refusing to make an order for the return of a ward to the custody of his guardian are appealable to the High Court.[3]

Act X of 1882, sec. 491.

2. The High Courts of Bengal, Madras and Bombay have also power to determine questions as to the proper custody of minors under sec. 491 of the Code of Criminal Procedure.[4] These powers may be exercised at the instance of guardians or at the instance of other persons who seek to remove minors from the custody of their guardians.[5] Section 491 provides that any one of those High Courts may, whenever it thinks fit, direct "(*a*) That a person within the limits of its ordinary original civil jurisdiction be brought up before the Court to be dealt with according to law. (*b*) That a person illegally or improperly detained in public or private custody within such limits be set at liberty." This takes the place of the writ of *habeas corpus*, which used to be issued by the Supreme Courts, and by the High Courts until 1875, when it was abolished so far as these purposes are concerned.[6]

It has been under this section and under sec. 148 of Act X of 1875[7] that the High Courts have most frequently dealt with questions as to the custody of minors.

Who may apply for order.

Any person interested in the welfare of a minor can apply under sec. 491, but it would rarely happen that an order would be made except at the instance of the minor or of some person claiming the custody of the minor.

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[1] Act VIII of 1890, sec. 45, see *ante*, p. 92, note 2.

[2] Either by way of fine or imprisonment.

[3] Act VIII of 1890, sec. 47 (*c*.)

[4] Act X of 1882.

[5] Outside the limits of their ordinary original civil jurisdiction, the High Courts have no summary powers to remove a ward from the custody of his guardian except under sec. 12 of Act VIII of 1890, *ante*, p. 90.

[6] Act X of 1875, sec. 148.

[7] Repealed by Act X of 1882.

Principles on which Courts act.

The High Courts have in the main acted upon the principles which guided the Court of Queen's Bench in issuing writs of *habeas corpus ;* but as Indian High Courts have always administered both common law and equity they were not confined to the same strict rules as governed the Queen's Bench before rules of equity prevailed in it.[1] In applying this section, the welfare of the minor, irrespective of his age, is the main feature to be regarded ;[2] but the Court will restore a minor to the custody of his guardian unless it be shewn that such custody be likely to be injurious to the minor.

Force ond fraud.

Except in the case where the Court finds the child in the custody of the father or other legal guardian, it will ordinarily restore a minor to the custody from which he has been removed by force or fraud[3], provided that custody is not an unlawful one, or one injurious to the minor.

Guardians and Wards Act.

The Court will not act unless it be in the interest of the minor that it should do so,[4] and will, so far as possible, administer the principles contained in the Guardians and Wards Act,[5] while refusing to recognise the rights of a guardian who had shewn himself by his bad conduct, or otherwise, incapable of properly performing his duties as guardian.

Rights of father or guardian.

In a summary proceeding of this description the Court will only interfere with the rights of the father, or other guardian, who has the custody of the child, where the danger to the minor is imminent, as where he has been

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[1] *In the matter of Saithri*, I L. R., 16 Bom., 307. In questions as to the custody and education of minors, the rules of equity now prevail in the Common law Courts as in the Chancery Courts in England ; *In re Goldsworthy*, 2 Q. B. D., 75.

[2] *In the matter of Saithri*, I. L. R., 16 Bom. at p. 336 ; *In the matter of Joshy Assam*, I. L R., 23 Calc., 290 ; *Kristo Kishor Neoghy* v. *Kudermoye*, 2 C. L. R. at p. 588 ; *Exp. Intiazzoonnissa*, 2 Madras Notes of Cases 107 ; *Thomasset* v. *Thomasset* [1894], P. D., 300 ; *Queen* v. *Gyngall* [1893], 2 Q. B., 232.

[3] See *Exparte Hopkins*, 3 Peere. Wms., 154 ; 7 East., 579 ; *R.* v. *Moseley*, 5 East., 224, note ; Forsyth on the Custody of Infants, p. 92.

[4] Cases *ante*, note 2.

[5] VIII of 1890, *ante*, chap. xi ; *In the matter of Saithri*, I. L. R., 16 Bom. at p. 336 ; *In the matter of Joshy Assam*, I. L. R., 23 Calc., 290.

guilty of cruelty to, or personal ill-usage of, the minor, or his conduct be of such a nature as to be likely to contaminate and corrupt the morals of his ward.[1]

Distinction between cases where the father is applying for custody, and cases where the application is made against the father.

This applies only where the Court, being moved by the minor, or his mother, or other relative, actually finds the minor in the custody[2] of his legal guardian. Where the legal guardian is applying to the Court for the enforcement of his rights to the custody of the child, the Court will go beyond those questions, and will not give the child to such guardian in any of the cases which[3] would justify the Court in appointing a person to act as guardian in the place of such guardian, or in restraining the father from interference with the education and maintenance and custody of his child, as for example where he has lost his rights by contract or waiver.[4]

Guardian appointed by the Court.

Where the minor has a guardian appointed by the Court, the custody of the minor should as of course be confided to such guardian, leaving it to the Court, which appointed him, to dismiss him if he ought to be removed.[5]

Effect given to wishes of minor.

The Court in acting under this section would pay regard to the wishes of a minor old enough to form a sound opinion as to his custody.[6]

Duty of Court.

In a proceeding under sec. 491, the Court cannot appoint a guardian of the minor's person. All it can do is to release the minor from illegal or improper custody, and where the minor is capable of exercising a discretion, to allow him to choose in whose custody he should remain ; or where the minor is not of such capacity, it can commit him to proper custody.

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[1] See *In the matter of Carrau*, 1 Hyde, 143.

[2] See Forsyth on the Custody of Infants, p. 66.

[3] *Ante*, pp. 96 and 97.

[4] *Ante*, pp. 78 and 79.

[5] As to the removal of Court-appointed guardians see *ante*, chaps. xii and xiv. Interference with the rights of a guardian appointed by a Court may amount to a contempt of the authority of the Court appointing him, and may be punished as such ; *ante*, p. 140.

[6] *Ante*, p. 99, note 3. "If the infant be of an age to elect for itself, the Court will merely interfere so far as to get it free from illegal restraint without handing it over to any body." *In re Andrews*, L. R., 8 Q. B., 158.

Practice under sec. 491 of Act X of 1882.

An application under sec. 491 should be supported by an affidavit, stating in whose custody the minor is, and such circumstances as would justify the Court in removing him from that custody,[1] and the right of the person, if any, applying for such custody.

Answer to application.

The Court is not bound by any fixed rule as to whether it should accept the truth of the answer to the application,[2] but must arrive at such conclusion, as may be possible, on the materials before it.

Evidence.

It may, if it think fit, require the persons making affidavits to be subjected to cross-examination, and may take *vivâ voce* evidence, but it would not often be necessary to adopt such course, as the proceeding is intended to be a summary one, and where there are difficult or complicated questions of law or fact to be determined or where the welfare of the minor may be imperilled by delay, it is better to require the parties to take proper proceedings for the appointment of a guardian.[3]

When summary proceedings inapplicable.

Examination of minor.

If the minor be of an age of intelligence the Court may examine him. The minor should in almost every case be brought into Court, so that the Court may ascertain whether he is under any illegal restraint. Although the Court would, in making an order, endeavour to provide for a compliance with the customs and manners of the country,[4] it would ordinarily be necessary to require a minor *purdahnasheen* to be produced in Court, as her examination by commission would rarely be satisfactory.[5]

Costs.

The Court has power to deal with the costs of proceedings under sec. 491.[6]

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[1] See rule 3 of rules made by the High Court of Bengal under sec. 148 of Act X of 1875.

[2] On this question there were, when the writ of *habeas corpus* was in force, two conflicting decisions of the High Court of Bengal within a short time of one another: *Queen* v. *Vaughan*, 5 B. L. R., 418, and *In the matter of Khatija*, 5 B. L. R., 557.

[3] *Ante*, chaps. xi and xiv.

[4] See Act VIII of 1890, sec. 12 (2), *ante*, p. 91.

[5] *In the matter of Beenodeeny*, 2 Hyde, 152; s. c., Coryton, 78. See *In re Thakoormoney*, 1 Hyde, 176.

[6] See *Kristokissor Neoghy* v. *Kadermoye*, 2 C. L. R., 583; *In the matter of Joshy Assam*, I. L. R., 23 Calc., 290. In certain cases under the Criminal Procedure Code express power is given to deal with costs (see secs. 433

Appeal.

An appeal lies in a High Court from the decision of a single judge dealing with the custody of a minor under sec. 491 of the Criminal Procedure Code.[1] Where it be desirable in the interests of the minor, the Court will stay execution of the order appealed from.

Power of Presidency and District Magistrates.

3. Certain limited powers are also possessed by the Presidency and District Magistrates with respect to the custody of female infants. Section 551 of the Criminal Procedure Code[2] provides that "upon complaint made to a Presidency Magistrate or District Magistrate on oath of the abduction or unlawful detention of a female child under the age of fourteen years, for any unlawful purpose,[3] he may make an order for the immediate restoration of such female child to her husband, parent, guardian, or other person having the lawful charge of such child,[4] and may compel compliance with such order, using such force as may be necessary."

4. A Divorce Court has power to provide for the custody of minor children, the marriage of whose parents is the subject of a suit.[5]

Court of Wards.

As to the power of a Collector in Bengal to make an order for the temporary custody of a minor heir, see Act IX (B.C.) of 1879, sec. 30, *post*, Chap. XXXI.

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and 526). It might be argued from this that where no such power is given, none exists (see *In the matter of Louis*, 15 B. L. R., App. 14). It must be remembered that sec. 491, although situate in a Code of Criminal Procedure, does not deal with matter of crime. It has merely taken the place of the writ of *habeas corpus*, with the costs of which the Courts were competent to deal.

[1] *In the matter of Narrondas Dhanji*, I.L.R., 14 Bom., 555, and *Kristokissor Neogy* v. *Kadermoye*, 2 C. L. R., 583.

[2] Act X of 1882.

[3] This must be a purpose in itself unlawful, not one which only becomes unlawful when entertained towards a child in opposition to the wishes of her guardian; *Abraham* v. *Mahtabo*, I. L. R., 16 Calc., 487.

[4] The Magistrate would only have power to enter into the question as to what is the lawful charge, and if he finds any one who is entitled to the guardianship, he should commit the child to the charge of such person. If there be no such person, then the Magistrate should restore the child to any (not unlawful) custody from which she may have been removed.

[5] Act IV of 1869, secs. 41 to 44. "Minor children" means, in the case of sons of native fathers, boys who have not completed the age of sixteen years, and in the case of daughters of native fathers, girls who have not completed the age of thirteen years. In other cases it means unmarried children who have not completed the age of eighteen years," see *ante*, p. 11.

CHAPTER XXI.

RATIFICATION AND AVOIDANCE.

Ratification of guardian's acts.

ON coming of age a minor must consider whether he will ratify or avoid the acts of his guardian, or his own voidable[1] acts, during his minority. However much a guardian may have exceeded his powers, or otherwise acted improperly in his trust, his acts will be rendered binding on the ward by being ratified by him, after he has attained majority,[2] and has full knowledge of all the material facts connected with the transaction so ratified.[3] A ward after coming of age is entitled to adopt any of the acts of his guardian on his behalf, whether they be or be not for his benefit. Completed acts of the guardian, even if not ratified, must be treated as valid until they are avoided.[4]

Acts of minor himself.

The principles, which apply to the ratification and avoidance of the acts of guardians, apply also to the ratification and avoidance of the voidable acts of a minor himself, done by him during his minority.[5] They apply also to

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[1] See *ante*, pp. 17, 28, and 29.

[2] *Chetty C. C. V. Reddyer* v. *Rungasawmy S. Jyengar*, 8 Moo. I. A., 319; *Prosonnanath Roy Chowdhry* v. *Afzolonnessa*, I. L. R., 4 Calc., 525; *Kumurooddeen* v. *Bhudoo*, 11 W. R. C. R., 134; *Saudut Alee Khan* v. *Aleemoollah*, 9 Beng. S. D. A., 494; *Prosonno Koomar Baral* v. *Sajudoor Rahman*, 9 Beng. S. D. A., 525; *Ramasami Aiyan* v. *Venkataramaiyan*, I. L. R., 2 Mad., 91; L. R., 6 I. A., 196. Act IX of 1872, sec. 196.

[3] See Act IX of 1872, sec. 198. In *Goolabdas Jugjivandas* v. *Collector of Surat*, I. L. R., 3 Bom. 186; L. R., 6 I. A., 54; in High Court, Bombay P. J. No. 69 of 1873, it was held that a minor, who ratified a mortgage under the mistaken belief that the property charged came to him as assets liable for ancestral debts, was not bound.

[4] *Hari Ram* v. *Jitan Ram*, 3 B. L. R. A. C., 426; 12 W. R. C. R., 378. As to avoidance see *post*, p. 214.

[5] As to a promise made after majority to compensate for services rendered before that event, see *Sindha Shri Ganpatsingji* v. *Abraham*, I. L. R., 20 Bom., 755.

transactions which have taken place between a guardian and ward while the influence of the guardian remains.[1]

What amounts to ratification.

The ratification of his own acts during minority, or of those of his guardian on his behalf, may be expressed by the minor, or may be implied from his conduct.[2] To amount to a ratification, there must be after majority, and after the late minor has acquired full knowledge of the nature and effect of the transaction, some promise or other act, which shews an intentional acknowledgment of his liability in respect of the act done by him or on his behalf during minority, and an election not to avoid it but to be bound by it.[3]

An acknowledgment of the guardian's acts, admitting himself liable on account of them,[4] or acting in such a way as to lead a person dealing with him to suppose that he had ratified them,[5] would amount to a ratification.[6]

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[1] *Ante*, pp. 130 to 132.

[2] Act IX of 1872, sec. 197.

[3] See *Rowe* v. *Hopwood*, L. R., 4 Q. B., 1; *Maccord* v. *Osborne*, 1 C. P. D., 568; *Ditcham* v. *Worrall*, 5 C. P. D., 410. "Every one who is of sufficient age and intelligence to execute a deed, whether he be an infant or a man of full age, and who does execute a deed, must be treated as knowing the contents of the instrument, which he executes," *per* Lord Macnaghten in *Edwards* v. *Carter* [1893], A. C. at p. 367.

[4] *Hurrochunder Chowdry* v. *Bungseemohun Doss*, 1 W. R. M. A., 16; *Saudut Alee Khan* v. *Aleemoollah*, Beng. S. D. A. Reps. 1853, p. 494; *Chetty C. C. V. Reddyer* v. *Runga-sawmy S. Jyengar*, 8 Moo. I. A., 319.

[5] *Kalee Sunkur Sannyal* v. *Denendro Nath Sannyal*, 23 W. R. C. R., 68; see Act I of 1872, sec. 115.

[6] In *Kebul Kristo Doss* v. *Ram Coomar Shah*, 9 W. R. C. R., 571, the plaintiff, eleven months after attaining his majority, signed for his mother a written statement in a suit to the effect that the property had been sold by her to the defendant, and in that suit he conducted his mother's defence, which was that the purchaser from her was entitled to what he claimed. It was held that he must be considered to have acquiesced in, and to have ratified, the sale. In *Golaub Koonwuree* v. *Eshan Chunder Chowdhoorre*, 8 Moo. I. A., 447; 2 W. R. P. C., 47, the defendants on attaining majority, being desirous of avoiding payment of certain bonds, which had been executed during their minority by their guardian, were advised that they could only do so by instituting a suit to which the guardian must be a party, and in which a settlement of his accounts would be required; but as the guardian was their spiritual guide, and had been their father's also, instead of instituting a suit against him, they thought it better to come to terms with the plaintiff in order to obtain time for the payment of the debt by instalments, and a *kisthundee* was accordingly executed. It was held by the Privy Council that the defendants could not, after the death of the guardian, dispute their liability for the payment of the debts.

A minor cannot make a conclusive election. A ratification or avoidance made by him before he attains majority can be avoided by him after majority, and no amount of acquiescence during minority will affect his rights.

Mere delay is not a ratification.

Mere delay in repudiating an act cannot be treated as a ratification of the act, and is no bar to a suit to set it aside, so long as the delay falls short of the period prescribed by the law of limitation ;[1] but it is evidence of ratification, and the silence of the ward may, coupled with other circumstances, justify the Court in raising therefrom the inference that the transaction has been ratified,[2] as for instance, where a ward, having full knowledge of the sale of his property by his guardian, and of the circumstances of such sale, sees the purchaser laying out large sums of money on the land, and raises no objection.[3]

Where a ward has had full knowledge of a transaction entered into on his behalf by his guardian, and has received the benefit of the consideration-money, or some other benefit from the transaction, or where he has acted on the arrangement or has permitted other parties to act on it, or where he has allowed third persons to acquire rights under it, ratification may be inferred.[4]

Any act, which expressly or impliedly recognises the guardian's act as binding, will be taken as confirming it: as for instance, continuance in possession after majority would be held to confirm a lease executed by the guardian. A re-sale of property bought by the guardian for his ward

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[1] *Rajnarain Deb Chowdhry* v. *Kassee Chunder Chowdhry*, 10 B. L. R., 324 ; *Kristo Gopaul Ghose* v. *Nilmoney*, 2 Hay, 164 ; *Dharmaji Vaman* v. *Gurrav Shrinivas*, 10 Bom. H. C. Rep., 311 ; *Daydu* v. *Kamble*, 2 Bom. H. C. Rep. at p. 360. As to the period of limitation, *see* Act XV of 1877, sec. 7, and 2nd schedule, art. 44, *post*, p. 213, and chap. xxviii.

[2] *Rajnarain Deb Chowdhry* v. *Kassee Chunder Chowdhry*, 10 B. L. R., 324 ; *Boiddonath Dey* v. *Ramkishore Dey*, 13 W. R. C. R., 166 ; 10 B. L. R., note to p. 326 ; *Doorga Churn Shaha* v. *Ram Narain Doss*, 13 W. R. C. R., 172 ; 10 B. L. R., note to p. 327 ; *Mongooney* v. *Gooroopersaud Bose*, 2 Morl. Dig., 188.

[3] *Bhobanny Persaud Ghose* v. *Teerpoorachurn Mitter*, 2 Morl. Dig., 103.

[4] *Mahomed Abdul Kadir* v. *Amtal Karim Banu*, I. L. R., 16 Calc., 161 ; L. R., 15 I. A., 220.

would ratify the original purchase. Acceptance of rent under a lease amounts to a confirmation of the lease.[1] Similarly, the appointment of new trustees under a marriage settlement, or the transfer of a fund to the trustees of the settlement, would be *primâ facie* evidence of the confirmation of the settlement.[2]

Cases where absence of repudiation amounts to ratification.

Where the minor has himself entered into a transaction and such transaction has been completed, as for instance, where a conveyance passing an estate has been executed by him, the absence of an express repudiation within a reasonable time may be taken to amount to an implied ratification.[3] In *Edwards* v. *Carter*[4] the Court declined to recognise a repudiation of a marriage settlement nearly five years after the attainment of majority, whereas in *In re Jones*[5] the wife was allowed to repudiate a settlement thirty years after she attained majority, but in that case no occasion for the repudiation had before arisen. The question is whether having regard to the facts of the particular case the repudiation is made within a reasonable time.

Partnership.

A person who has been admitted to the benefits of partnership under the age of majority becomes, on attaining that age, liable for all obligations incurred by the partnership since he was so admitted unless he gives public notice, within a reasonable time, of his repudiation of the partnership.[6] If he gives such notice, his share in the partnership business is alone liable.[7]

Continuing obligations.

A repudiation within a reasonable time is also necessary in the case of continuing obligations entered into by the minor, or on his behalf, during his minority: as for instance, where he has engaged a servant, or an attorney,[8] or

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[1] *Ram Chunder Sircar* v. *Pran Gobind Boishnub*, 25 W. R. C. R., 71.

[2] Simpson on Infants, 2nd Edn., p. 69.

[3] *Doorya Churn Shaha* v. *Ram Narain Doss*, 13 W. R. C. R., 172; 10 B. L. R., note to p. 327; *Boiddonath Dey* v. *Ramkishore Dey*, 13 W. R. C. R., 166; 10 B. L. R., note to p. 326. Simpson on Infants, 2nd Edn., p. 72.

[4] [1893] A. C., 360.

[5] [1893] 2 Ch., 461.

[6] Act IX of 1872, sec. 248, *ante*, p. 23.

[7] Act IX of 1872, sec. 247, *ante*, p. 23.

[8] *Thomas* v. *Waldo*, 1 F. & F., 173. Simpson on Infants, 2nd Edn., p. 71.

has himself entered into a contract of service[1] before attaining majority, and the service continues after he has attained that age; but in these cases he will not without an express ratification be held liable on that part of the obligation which existed only before he attained majority. The absence of repudiation will merely imply a fresh contract entered into on attaining his majority, and will not render him liable for that part of the service of the servant or attorney which was performed before he was of age, except where the continued employment is such as to amount to an implied undertaking to pay the prior part of the demand incurred during minority.[2]

Ratification in prejudice of valid act.

He cannot ratify a voidable act when such ratification will injure rights validly created subsequently to his having attained majority: as for instance, he cannot after he has transferred property to another ratify charges created on such property by his guardian.[3]

Withdrawal of ratification.

A person who has once ratified an act of his guardian, or one by himself done during his minority, cannot afterwards withdraw such ratification, except where it has been obtained from him by fraud or misrepresentation.[4]

Limitation of suit to set aside acts of guardian.

A suit to set aside a sale of a ward's property made by his guardian must be brought within three years from the time of the ward attaining the age of majority.[5] In the case of a mortgage or lease the ordinary limitation applies,[6] *i.e.*, if the minor is seeking to obtain possession of the property he can take advantage either of article 144 of the 2nd Schedule of the Limitation Act[7] or of sec. 7 of that Act.[8] Where he is merely seeking to obtain cancellation of the instrument article 91 applies.[9]

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[1] *Wray* v. *West*, 15 L.T.N.S., 180. See Macnaghten's Precedents of Mahomedan Law, chap. viii, case 6.

[2] Simpson on Infants, 2nd Edn., p. 71.

[3] *Rawutu Lal* v. *Chadee Thuthara*, Beng. S. D. A., 1858, p. 312.

[4] *Saudut Alee Khan* v. *Aleemoollah*, Beng. S. D. A., 1853, p. 494.

[5] Act XV of 1877, sched. ii, art. 44. See *Ramphul Singh* v. *Degnarain Singh*, I. L. R., 8 Calc., 517; 10 C. L. R., 489.

[6] See *Ramansar Pandey* v. *Roghubar Jati*, I. L. R., 5 All., 490.

[7] Act XV of 1877.

[8] *Post*, chap. xxviii.

[9] If before he attained majority he knew of the facts which entitle him to have the instrument cancelled

Repudiation of dealings during minority.

A contract or other transaction may be repudiated by any act or omission of the late minor, by which he intends to communicate the repudiation, or which has the effect of repudiating it ;[1] for instance, a transfer of land by him avoids a transfer of the same land made by him or by his guardian before he attained the age of majority. A suit to set aside the acts of himself or of his guardian during his minority amounts of course to an express repudiation.

The repudiation may be similarly revoked.

No summary remedy.

When a minor wishes to avoid his own act during minority or an unauthorised act of his guardian he must, if he wishes to clear his title or to oust some person in possession of property by authority of the act, which it is sought to avoid, or otherwise actively to get rid of the effect of such act, bring a suit, and cannot obtain any summary remedy from a Court.[2]

Repudiation by representatives.

Where a person dies during minority, or after the attainment of his majority without having ratified an act either of himself or his guardian, which if ratified would have bound his estate, the persons entitled to succeed to his property after his death can avoid the act, but no one else can avoid it. A purchaser at an execution-sale cannot repudiate encumbrances charged on the estate by a minor, or by the guardian of such minor,[3] or any other transactions which would be valid unless repudiated.

Guardian cannot repudiate his own act.

A guardian cannot repudiate his own act, or endeavour to set aside any dealing by him with his ward's property on the ground that it was prejudicial to the interests of the ward.[4] Any friend of the minor may

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he has by sec. 7 three years from attaining majority within which to sue. Otherwise he has three years from the time when he knew of such facts.

[1] See Act IX of 1872, secs. 3, 5, and 66.

[2] *Mukrummunnissa* v. *Abdool Jubbar*, 17 W. R. C. R., 171.

[3] *Hari Ram* v. *Jitan Ram*, 3 B. L. R. A. C., 427; 12 W. R. C. R., 378.

[4] *Monmohinee Joyinee* v. *Jugobundhoo Sudhooka*, 19 W. R. C. R., 233; *Ramdoolary Kooer* v. *Thacoor Roy*, 2 C. L. R., 547. See Act I of 1872, sec. 115.

repudiate the transaction by bringing a suit on the minor's behalf.

A guardian can repudiate a transaction entered by another person, professing to act on behalf of the minor. He may also repudiate the acts of a former guardian of the minor.[1]

Mesne profits.

When the Court sets aside a sale made by a minor, or by his guardian on his behalf, it will require the purchaser to account to the minor for the mesne profits of the estate while it has been in his possession.[2]

Person repudiating act must restore other party to position which he occupied at time of act.

A person who disputes the authority of another to act as his guardian, and repudiates the acts done by such guardian in that capacity, or who repudiates his own acts during his minority, cannot take advantage of those acts so far only as they are beneficial to him.[3] He cannot avoid a contract or other arrangement which is free from fraud or a like defect, without restoring a party thereto, who has acted upon it, to the position which he occupied at the time of the arrangement being made.[4] If he disavows a sale made by his guardian to clear his estate from debt, he is only entitled to get back the property in the position in which it would have been had no sale taken place ; that is to say, with the incumbrances which the sale was intended to remove ;[5] and in the case of any sale or charge where the purchaser or lender has acted *bonâ fide*, and, if he is a purchaser, has paid a fair price for the property, and the money has been applied in any way to the minor's benefit, the property will be considered as charged with

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[1] See *Bolakee Sahoo* v. *Court of Wards*, 14 W. R. C. R., 34. *Sheo Pershad Jha* v. *Gunga Ram Jha*, 5 W. R. C. R., 221.

[2] *Shurrut Chunder Dey Sircar* v. *Jadub Narain Nundee*, 1 W. R. C. R., 90 ; *Luchmun Singh* v. *Miriam*, 5 W. R. C. R., 219 ; *Gour Pershad Narain* v. *Sheo Pershad Ram*, 5 W. R. C. R., 103 ; *Bunseedhur* v. *Bindesseree Dutt Singh*, 10 Moo. I. A. 454 ; 1 Ind. Jur. N. S., 165.

[3] *Soobah Doorga Lal Jha* v. *Neelanund Singh*, 7 W. R. C. R., 74. *Doorga Churn Shaha* v. *Ramnarain Doss*, 13 W. R. C. R., 172 ; 10 B. L. R., note to p. 327.

[4] See Act IX of 1872, secs. 64 and 65.

[5] *Bukshan* v. *Maldai Kooeri*, 3 B. L. R. A. C., 423 ; s.c., *Bukshun* v. *Doolhin*, 12 W. R. C. R., 337 ; *Hamir Singh* v. *Zakia*, I. L. R., 1 All., 57.

the payment of such money and the minor is not entitled to a decree for possession without refunding with interest such money as has been applied for his benefit, a set-off being allowed to him for net rents and profits for the time the property was in the possession of the purchaser.[1]

Improvements.

The minor may also be required to repay any money which the purchaser may have laid out in improvements; but it would depend upon the circumstances under which the purchaser took possession and the nature of his outlay, whether he ought in equity to be allowed to claim reimbursement of the money expended by him.[2]

Recovery of money paid under contract which is avoided.

Where a person repudiating a contract made during his minority endeavours to recover money paid under that contract, the English rule of law is, that where the consideration, on account of which the money was paid, has totally failed, the minor can recover back his money ;[3] but that, where there has been a performance of any part of the consideration, he cannot recover back any portion of the money advanced by him, unless he is able to restore the other party to the position which he occupied before the contract.[4] The Indian law is apparently on the same footing.[5]

Repudiation of gift.

In the case also of a gift, or other transfer without real consideration, made by a minor, or by a person, who has

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[1] *Muthoora Doss* v. *Kanoo Beharee Singh*, 21 W. R. C. R., 287 ; *Baikesar* v. *Bai Ganga*, 8 Bom. H. C. Reps., 31; *Kuvarji* v. *Moti Haridas*, I. L. R., 3 Bom., 234; *Doorganath Roy* v. *Ram Chunder Sen*, I. L. R., 2 Calc., 341 ; L. R., 4 I. A., 52; *Doorga Churn Shaha* v. *Ramnarain Doss*, 13 W. R. C. R., 172 ; 10 B. L. R., note to p. 327 ; *Nizam-ud-din Shah* v. *Anandi Prasad*, I. L. R., 18 All., 373; *Mukundi* v. *Sarabsukh*, I. L. R., 6 All., 407; *Banseedhur* v. *Rindeseree Dutt Singh*, 10 Moo. I. A., 454; 1 Ind. Jur. N. S., 165. *Paran Chunder Pal* v. *Karunamayi*, 7 B. L. R., 90 ; 15 W. R. C. R., 268 ; *Shooghury Koer* v. *Boshisht Narain Singh*, 8 W. R. C. R., 331 ; *Shurrut Chunder* v. *Rajkissen Mookerjee*, 15 B. L. R., 350; s.c., *Surut Chunder Chatterjee* v. *Ashutosh Chatterjee*, 24 W. R. C. R., 46.

[2] *Morgan* v. *Abdool Hye*, 23 W. R. C. R., 393. Act IV of 1882, sec. 51.

[3] *Corpe* v. *Overton*, 10 Bing., 252 ; See Simpson on Infants, 2nd Edn., p. 75.

[4] Simpson on Infants, 2nd Edn., p. 75 ; *Holmes* v. *Blogg*, 8 Taunt., 508 ; Dart's Vendors and Purchasers, 6th Edn., p. 31.

[5] IX of 1872, secs. 64 and 65.

recently arrived at majority, in favour of his guardian, the person repudiating the transaction may be required to refund money expended for the improvement or preservation of the property;[1] but it will depend upon the circumstances of the case whether he ought to be required so to do.

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[1] *Ram Ghose* v. *Kalee Pershad Ghose*, 4 Sel. Rep. 17, 2nd Edn., 22. See *Luchmun Dass* v. *Rupchand*, 5 Sel. Rep. 17, 2nd Edn., 136.

CHAPTER XXII.

MAINTENANCE, ADVANCEMENT AND EDUCATION.

Duty of father to maintain his children.

ACCORDING to the Hindu,[1] Mahomedan,[2] and English laws alike, it is the duty of a father to support such of his children as are incapable of supporting themselves. According to Mahomedan law, this duty falls on the father alone. Hindu law extends the obligation to other relations,[3] but, in the case of relations other than the father, the obligation of supporting infants would, amongst Hindus, be only a religious obligation, and not enforceable by law.

Although the law recognises the duty of the father to maintain and educate his children, the Civil Courts have no direct means of enforcing this obligation,[4] so as to compel him to maintain them out of property in which they have no interest.[5] The Court can, however, in certain cases where the father attempts to relieve himself of the obligation by applying to the maintenance of his child separate funds belonging to that child, indirectly impose upon him the liability of providing for his child out of his own income.[6]

Authority to contract debts for maintenance.

Where the father does any specific act, from which it can be reasonably inferred that he has given his child authority to contract a debt for his maintenance, the

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[1] Strange's Hindu Law, vol. i, p. 67.

[2] Baillie's Digest, Part I, p. 455.

[3] Strange's Hindu Law, Vol. I, p. 67.

[4] See remarks of Lord Eldon, L. C., in *Wellesley* v. *Beaufort*, 2 Russ. at p. 23.

[5] Where they have a joint interest with their father, he can be compelled to maintain them out of the joint property, but that obligation does not arise out of the parental relationship.

[6] *Post*, p. 226.

father may be liable in respect of the debt so contracted, but the mere moral obligation to maintain the child affords no inference of a legal promise to pay his debts.[1] Where no authority is proved, or can be inferred, or where the facts expressly negative any such inference, as for instance, where the father has no knowledge of the debts being incurred,[2] or where the son has an allowance,[3] there can be no liability. Where the father permits his children to live with his wife, or any other person, apart from him, it is a question in each case whether by so doing he has authorized his wife, or such other person, to incur debts for necessaries for his children.[4]

Duty can only be directly enforced by the criminal law.

The only means by which a father can be directly compelled to maintain his infant children is by the criminal law, which forces the father to provide a subsistence for his children. He cannot be compelled to educate them, or even to support them according to his own station in life. A bare subsistence is all that he can be compelled to provide for them.

The provisions of the Criminal Procedure Code with respect to maintenance.

The Code of Criminal Procedure, provides[5] as follows:— "If any person,[6] having sufficient means,[7] neglects[8] or refuses to maintain his wife, or legitimate or illegitimate child[9]

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[1] *Mortimore* v. *Wright*, 6 M. & W., 487.

[2] *Urmston* v. *Newcomen*, 4 A. & E., 899.

[3] *Crantz* v. *Gill*, 2 Esp., 471.

[4] *Rawlins* v. *Vandyke*, 3 Esp., 252; *Cooper* v. *Phillips*, 4 C. & P., 581.

[5] Act X of 1882, sec. 488. This section applies to Malabar: *Ayyapattar* v. *Kalianiammal* referred to in I. L. R., 19 Mad. at p. 462.

[6] Even though himself a minor, *Queen* v. *Roshun Lall*, 4 N.-W. P. H. C. Rep., 123. A married woman may obtain an order for the maintenance of her illegitimate children by the putative father. *Rozario* v. *Ingles*, I. L. R., 18 Bom., 468.

[7] See *Queen* v. *Roshun Lall*, 4 N.-W. P. H. C. Rep., 123.

[8] In the case of parties governed by the Marumakkatayam law, it is doubtful, if the father could be held to have neglected his duty if the children are actually maintained by the karnavan of their mother's tarwad who is bound to maintain them; *Kariyadan Pokkar* v. *Kayat Beeran Kutti*, I. L. R., 19 Mad. 461. The question of the relative blame of the parents is not to be considered: *Queen* v. *Roshun Lall*, 4 N.-W. P. H. C. Rep., 123.

[9] An order for the maintenance of an unborn child cannot be made: *Larlee* v. *Bunsee Ditchit*, 3 N.-W. P. H. C. Rep., 70. The father is equally liable whether he has the right to the custody, or he has lost such right. He is liable even if the mother wrongly refuses to make over the custody to him: *Lal Dass* v. *Nekunjo*, I. L. R.,

unable to maintain himself,[1] the District Magistrate,[2] a Presidency Magistrate, a Sub-Divisional Magistrate, or a Magistrate of the first class, may, upon proof[3] of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child at such monthly rate,[4] not exceeding fifty rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.[5] Such allowance shall be payable from the date of the order.

How Magistrate's order enforced.

"If any person so ordered wilfully neglects to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines,[6] and may sentence such person for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month."[7]

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4 Calc., 374; see *Kariyadan Pokkar* v. *Kayat Beeran Kutti*, I. L. R., 19 Mad., 461.

[1] This is independent of the age of majority; *In the matter of Todd*, 5 N.-W. P. H. C. Rep., 237.

[2] In Bombay it has been held that this means the Magistrate of the District in which the person resides against whom the complaint is made; *In re Fakruddin*, I. L. R., 9 Bom., 40. *Contrâ; In the matter of Todd*, 5 N.-W. P. H. C. Rep., 237.

[3] *i.e.*, legal proof, *Gonda* v. *Pyari Doss Gossain*, 13 W. R. Cr. R., 19; *Lopotee* v. *Jikha Modai*, 8 W. R. Cr. R., 67.

[4] The Magistrate must order a fixed sum. He cannot make an order at a progressively increasing rate. Where there is a change of circumstances the rate can be increased under sec. 489, *post*, p. 221; *In re Ramayee*, I. L. R., 14 Mad., 398; *Upendranath Dhal* v. *Sowdaminee*, I. L. R., 12 Calc., 535.

[5] The Magistrate cannot appoint a guardian or make any order as to the custody of a child; *Lal Das* v. *Nekunjo*, I. L. R., 4 Calc., 374. This can only be done by a Civil Court. The Magistrate is not obliged to order the allowance to be paid to the legal guardian, but in the absence of good reason to the contrary he would ordinarily do so.

[6] *i.e.*, by distress and sale of the moveable property of the father; Act X of 1882, secs. 386 and 387. As to the carrying out of orders against European British soldiers, see 44 and 45 Vict., Cap. 58, secs. 138 (8), and 145, continued by 58 Vict., Cap. 7, sec. 2.

[7] *i.e.*, one month's imprisonment for each month's default: *Allapichai* v. *Mohidin*, I. L. R., 20 Mad., 3. The defaulter is not entitled to release on payment of the amount due: *Biyacha* v. *Moidin Kutti*, I. L. R., 8 Mad., 70, but a discharge from an Insolvent Court relieves him of the debt: *Tokee* v. *Abdool Khan*, I. L. R., 5 Calc., 536.

Evidence must be taken in the presence of the father, or where his presence is dispensed with, in the presence of his pleader and must be recorded as in summons cases.[1] The reputed father may be called as a witness.[2]

Alteration of allowance.

The Code of Criminal Procedure[3] also provides that, on proof of a change in the circumstances of any person receiving under sec. 488 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife or a child, the Magistrate may make such alteration in the allowance as he thinks fit, provided the monthly rate of fifty rupees be not exceeded.

This provision cannot be used as a means of reviewing the Magistrate's decision except upon proof of facts which have occurred since the date of the order.

Revision.

There is no appeal from an order made by the Magistrate requiring a person to make a monthly allowance for the maintenance of his wife or child ;[4] but if there be any material error in the proceedings, the order may be revised by a High Court.[5]

Maintenance of minor wives.

The rights of minor wives to maintenance from their husbands are enforceable in the same way as the rights of adult wives to such maintenance.[6]

Enforcement of order of maintenance.

A copy of the order of maintenance is to be given without payment to the person in whose favour it is made or to his guardian, if any, or to the person to whom the allowance is to be paid ; and such order is enforceable by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due.[7]

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[1] Act X of 1882, sec. 488. *Harkishore Malo* v. *Bharoti Jelyani*, 24 W. R. Cr. R., 61.

[2] *Noor Mahomed* v. *Bismulla Jan*, I. L. R., 16 Calc., 781 ; *Hira Lal* v. *Saheb Jan*, I. L. R., 18 All., 107.

[3] Act X of 1882, sec. 489. There cannot be a prospective order for an alteration : *Munglo* v. *Jumna Dass*, 2 N.-W. P. H. C. Rep., 454 ; *ante*, p. 220, note 4.

[4] *Queen* v. *Gholam Hossein Chowdry*, 7 W. R. Cr. R., 10.

[5] Act X of 1882, sec. 439.

[6] See Act X of 1882, sec 488, *ante*, p. 219. As to Mahomedan wives, see *In the matter of Khatija*, 5. B. L. R., at p. 567 ; *Kolashan* v. *Didar Buksh*, 24 W. R. Cr. R., 44, *ante*, p. 65.

[7] Act X of 1882, sec. 490.

These provisions of the Criminal Procedure Code apply to all persons of whatever nationality residing in British India.

Duty of guardians as to maintenance of ward.

The guardian of a minor's person must, out of the income of his ward's estate, provide a proper maintenance for such ward, *i.e.*, he must see that the minor is clothed, housed, fed and educated in a manner suitable to his position in life, and to the fortune which he is to enjoy on attaining the age of majority; he will be allowed all sums properly expended for the protection and safety, or for the maintenance and support of the ward.[1]

Maintenance of members of family.

The guardian must also provide for the maintenance of such of the members of his ward's family as, according to the customs of the family or race to which the ward belongs, are dependent upon the ward for support.[2]

Amount of maintenance.

The principles which influence the High Courts in determining what sum should be allowed for the maintenance or advancement of a minor[3] should also guide a guardian. He should never allow his ward's estate to be used for his maintenance in cases where the Court would not allow it, and he must not expend more than the Court would allow. Otherwise the guardian might become personally liable for the amount expended by him.

Application to High Court.

Where a guardian, who has not been appointed by the Court, has any real difficulty with reference to the application of the minor's funds towards his maintenance or advancement, he should, if the minor be resident within the original civil jurisdiction of a High Court[4] or his property be within the limits of that jurisdiction, apply to that Court for its sanction or direction. He may do so either by a suit or by a petition without a suit.[5]

Duty of guardian appointed or declared by Court.

A guardian of a minor's property appointed or declared by a Court under the Guardians and Wards Act must apply

[1] Act VIII of 1890, secs. 24, *ante*, p. 133; *Nelson* v. *Duncombe*, 9 Beav., 232.

[2] See Act VIII of 1890; sec. 34 (e), *ante*, p. 135.

[3] *Post*, pp. 226 to 231. See *Barnes* v. *Ross* (1896), A. C., 625.

[4] There is a question whether these powers cannot be extended to all European British subjects resident within the Province. See *ante*, p. 121.

[5] *In the goods of Dwarkanath Dutt*, Belchambers's Practice, p. 444 *c*; *Ex parte Whitfield*, 2 Atk., 316; *Ex parte*

for the maintenance, education, and advancement of the ward and of such persons as are dependent on him, and for the celebration of ceremonies to which the ward or any of those persons may be a party, such portion of the income of the property of the ward as the Court from time to time directs, and, if the Court so directs, the whole or any part of that property.[1] The guardian can apply by petition to the Court for its opinion, advice and direction as to the amount to be expended by him, and if he states in good faith the facts in his petition, he is absolved from responsibility.[2]

Application to Court for advice, &c.

A guardian appointed by a High Court can apply by petition to the Court which appointed him for direction.

The Guardians and Wards Act is silent as to what principles should guide Courts acting under that Act in fixing maintenance. The Courts should have regard to the status in life of the ward and the amount of his income. They should also, so far as possible, apply the principles which guide the High Courts in fixing maintenance.[3]

A guardian, who has not been appointed or declared by a Court, and whose ward is neither resident, nor possesses any property, within the original civil jurisdiction of a High Court, must act upon his own responsibility, or require the Court to appoint a guardian.

Duty of natural guardian.

Where there are more guardians than one, and they cannot agree as to the manner or amount of the minor's maintenance, one of them may apply to the Court of the District in which the minor ordinarily resides for directions.[4]

Difference of opinion between guardians.

Where the instrument, which creates the minor's interest in property, gives a discretion to trustees, the Court will not interfere with the *bonâ fide* exercise of that discretion.[5]

Discretion of trustees.

Chambers, 1 Russell and Mylne, 577. See also *Ex parte Bittan*, I. L. R., 2 Calc., 357.

[1] Act VIII of 1890, sec. 34 (*e*). The duty of a guardian appointed by a High Court under the powers contained in its Charter would be the same. Without an order of Court a payment by a guardian on these accounts would be at his peril.

[2] Act VIII of 1890, sec. 33, *ante*, p. 160.

[3] *Post*, pp. 226 to 231.

[4] Act VIII of 1890, sec 43, *ante*, p. 161.

[5] *In re Bryant* [1894], 1 Ch., 324.

Powers of trustees holding property in trust for minors.

When property is held by trustees in trust for a minor, full powers to provide for the maintenance of their *cestui que trust* are given, in cases to which the English law is applicable,[1] by the Trustees and Mortgagees Powers Act,[2] which enacts that "in all cases where any property is held by trustees in trust for a minor, either absolutely or contingently on his attaining majority, or on the occurrence of any event previously to his attaining majority, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such minor, or otherwise to apply for or towards the maintenance or education of such minor, the whole or any part of the income to which such minor may be entitled in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education, or not :

"And such trustees shall accumulate all the residue of such income by way of compound interest, by investing the same, and the resulting income thereof from time to time in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen :

"Provided always that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations, as if the same were part of the income arising in the then current year."

Indian Trusts Act.

By sec. 36, of the Indian Trusts Act, 1882,[3] in addition to the powers expressly conferred by the Act, and by the instrument of trust and subject to the restrictions, if any, contained in such instrument, and to the provisions of sec. 17[4] a trustee may do all acts which

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[1] *Ante*, p. 39, note 5.

[2] Act XXVIII of 1866, sec. 33. This section has been repealed in places to which the Indian Trusts Act, 1882, extends; Act II of 1882, sec. 2; see *ante*, p. 39, note 4.

[3] Act II of 1882; as to its application, see *ante*, p. 39, note 4.

[4] Sec. 17. "Where there are more beneficiaries than one, the trustee is bound to be impartial, and must not execute the trust for the advantage of one at the expense of another.

are reasonable and proper for the protection or support of a beneficiary who is not competent to contract.

By sec. 41 of the same Act: "Where any property is held by a trustee in trust for a minor, such trustee may, at his discretion, pay to the guardians (if any) of such minor, or otherwise apply for or towards his maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral, the whole or any part of the income to which he may be entitled in respect of such property: Application of income to maintenance.

"And such trustee shall accumulate all the residue of such income by way of compound interest, by investing the same, and the resulting income thereof from time to time in any of the securities mentioned or referred to in sec. 20,[1] for the benefit of the person who shall ultimately become entitled to the property, from which such accumulations have arisen. Investment of residue.

"Provided that such trustee may, at any time, if he think fit, apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year. Application of accumulations.

"Where the income of the trust property is insufficient for the minor's maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral, the trustee may, with the permission of a principal Civil Court of original jurisdiction, but not otherwise, apply the whole or any part of such property for or towards such maintenance, education, advancement or expenses. Application of principal sum.

"Nothing in this section shall be deemed to affect the provisions of any local law for the time being in force relating to the persons and property of minors." Not to affect local law.

The High Courts in the exercise of their jurisdiction, as respects infants, and also in the exercise of their ordinary original Civil Jurisdiction, can provide for the maintenance and education of minors. Powers of High Court.

Where the trustee has a discretionary power, nothing in this section shall be deemed to authorize the Court to control the exercise reasonably, and in good faith of such discretion."

[1] *Ante*, p. 182, note 5.

The exercise of this power is regulated by principles similar to those which guide the Court of Chancery in allotting maintenance to minors. An order can be made whether or not the instrument creating the minor's interest contains any direction for maintenance.

There must be a clear fund or income.

An order cannot be made unless the minor possesses a clear fund or income applicable to the purpose, and not depending on the doubtful result of accounts. Where it is clear that, after the taking of the accounts and the payment of debts, a certain balance will be left to the minor, maintenance not exceeding the income of such balance may be ordered.[1]

Interest must be vested.

The minor must have a vested interest in the fund[2] or must be entitled to immediate payment of the income.[3]

Exceptions to this rule.

No provision can be made for a minor's maintenance out of a gift which is vested but the payment of it is postponed,[4] or out of a contingent gift,[5] except where the instrument, by which the minor takes, itself provides for maintenance (in which case maintenance can always be allowed[6]), or where the gift is one made by the father, or by some other person standing *in loco parentis* to the minor, and the minor is otherwise unprovided for,[7] or it is a gift to a class, all or some of whose members must take, or it is a gift to a class or an individual, and the donees over in default of the class or individual taking consent to maintenance being given.[8]

Indirect means of compelling father to maintain children.

The Court can indirectly enforce the duty of the father to maintain his children by preventing, or superintending, the appropriation of the minor's funds for the purpose of their

[1] *Warter* v. *Anon*, 13 Ves., 92.

[2] Macpherson on Infants, p. 241; Simpson on Infants, 2nd Edn., p. 262. As to the vesting of legacies, *see* Part XIII of Act X of 1865. A direction to accumulate the income during minority will not prevent maintenance being given; see Act X of 1865, sec. 104, and illustration (*e*) to the same section.

[3] *Boycot* v. *Cotton*, 1 Atk., 552.

[4] See *Festing* v. *Allen*, 5 Hare, 577.

[5] Simpson on Infants, 2nd Edn., p. 265.

[6] See *Lyddon* v. *Lyddon*, 14 Ves., 558; *Ellis* v. *Maxwell*, 3 Beav., 587.

[7] See Simpson on Infants, 2nd Edn., p. 266; Macpherson on Infants, p. 234.

[8] See Simpson on Infants, 2nd Edn., p. 274.

maintenance; but it will allow maintenance out of funds belonging to the minor even during the lifetime of the father, where the father is not in such circumstances as to be able to give his child such an education as is suitable to the fortune of such child,[1] or in a case, where to refuse maintenance would be a hardship upon the father's other children.[2]

Cases where Court will allow maintenance to minor during lifetime of father.

Where in an ante-nuptial settlement there are express trusts and provisions for the maintenance of the offspring of the proposed marriage, the father is entitled to have such trusts carried out, whether or not he is of ability to support the children. If the settlement merely gives power to apply the income or any part thereof to the maintenance of the children, then the father is not so entitled.[3] This doctrine will not be extended to the case of a voluntary post-nuptial settlement.[4]

Trust for maintenance in marriage settlement.

Where a fund is expressly given for the maintenance of his children, the father can, although of sufficient ability to support the child out of his other income, apply it, or insist upon its being applied, for that purpose.[5]

Gift to father for maintenance.

The obligation which the law imposes upon the father to maintain his children exists only where the father enjoys the care and custody of their persons and the superintendence of their education. Where the Court has in consequence of his misconduct interfered with the father's right to the custody of them, or where the father has himself waived that right in favour of some other person,

Obligation to maintain exists only where he has the custody.

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[1] See *Buckworth* v. *Buckworth*, 1 Cox, 80. In *Jervoise* v. *Silk*, G. Cooper, 52, Grant, M. R., said that it would be a harsh thing for the Court to oblige the father to put down his establishment in any part to educate his children when they have incomes of their own. A father cannot, where his children have incomes of their own, be required to stint himself and alter his own mode of living for the purpose of giving them a maintenance or education suitable to their independent fortunes.

[2] *Hoste* v. *Pratt*, 3 Vesey, Jun., 733; *Andrews* v. *Partington*, 3 Brown's Chancery Cases, 60; 2 Cox, 223.

[3] *Ransome* v. *Burgess*, L. R., 3 Eq., 780; *Wilson* v. *Turner*, 22 Ch. D., 521.

[4] *Re Kerrison's Trusts*, L. R., 12 Eq., 422.

[5] *Hamley* v. *Gilbert*, Jacob, 3 61; *Berkeley* v. *Swinburne*, 6 Sim., 613. See cases cited at p. 295 note (*l*) of Simpson on the Law of Infants, 2nd Edn., and see Macpherson on the Law of Infants, p. 245.

the private fortunes of the children must be applied to their maintenance, quite independently of the question whether the father is of sufficient ability to support them.[1]

Funds from which maintenance given.

Apart from special circumstances, the income of the minor's estate should alone be applied to his maintenance and education, and no encroachment should be made upon the principal. Trustees would rarely be allowed any payment made by them in excess of the income of the fund; but where the income is not a constant one, or the result disappoints a reasonable expectation of what that income would be, the trustees would be allowed what they had properly expended in view of the probable income of the estate.[2]

Income.

In some cases trustees can employ the surplus accumulations of the income of the fund for the maintenance of the *cestui que trust*,[3] but their powers in this respect depend upon the construction of the instrument creating the trust. Where there is an express power in the instrument, the trustees can exercise it according to their discretion; but where, on the other hand, the instrument places the accumulations on the same footing as the capital fund, neither the trustees nor the Court can break in upon the accumulations, except in the same events as would justify them in breaking in on the capital.[4]

Accumulations.

Where more than one fund.

Where there is more than one fund from which maintenance can be taken, the fund, the taking from which would be the least likely to diminish the property which the minor would come into on attaining his majority, should be selected.[5]

Maintenance allowed out of capital.

There are certain cases where the Court will permit maintenance for a minor to be taken out of the capital of

[1] Lord Eldon says in *Wellesley* v. *Beaufort*, 2 Russ., 19: "I am not aware of any case in which the Court, where it has taken away from the father the care and custody of his children, has called in aid of their own means the property of the father."

[2] See Simpson on Infants, 2nd Edn., p. 299; *ante*, p. 224.

[3] See *Edwards* v. *Grove*, 2 De Gex, Fisher & Jones, 210.

[4] See *Ex parte McKey*, 1 Ball. & Beatty, 405. As to wills, see Act X of 1865, sec. 104, illustration (*e*).

[5] See Simpson on Infants, 2nd Edn., p. 320; Macpherson on Infants, p. 252.

his property.[1] It is, however, never wise for the guardian or trustee to entrench on the minor's capital without receiving the sanction of the Court,[2] as even if he were right in breaking in upon the capital he may have to bear the costs of subsequently obtaining the sanction of the Court, if there be a deficiency of assets.[3]

When property small.

Where the minor's property is very small, and the income of it is insufficient to maintain him or to give him a suitable education, the Court will break in on the principal.[4] It will also do so where a sum of money is necessary for the purpose of setting the minor up in, or educating him for, a business or profession, or otherwise advancing him in life.[5] An advance can only be made out of the capital where the minor is absolutely entitled to the fund, or a power is given by the instrument of gift.[6] Sums of money for the maintenance, education, or advancement of minors may also be raised out of their reversionary or contingent interests in property by means of a scheme of insurance or otherwise.[7] The Court would be very reluctant to allow a sale if it could possibly be avoided, and in preference to a sale would frequently allow the money to be raised by mortgage.

For advancement.

Amount allowed.

The amount which the Court will allow, or a guardian may with safety expend, depends upon the age, the rank, the fortune, and the expectations of the minor. It must be sufficient to give to him maintenance and education suitable to the position which he will occupy on coming of age.[8]

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[1] See Simpson on Infants, 2nd Edn., p. 306.

[2] If an executor or trustee does without application what the Court would have approved, he will not be called to account, and forced to undo that, merely because it was done without application; *Lee* v. *Brown*, 4 Vesey Jun., 369.

[3] *Robison* v. *Killey*, 30 Beav., 520.

[4] See *Barlow* v. *Grant*, 1 Vern., 255.

[5] *Re Lane*, 17 Jur., 219; *Re Clark*, 17 Jur., 362; and cases collected in Simpson on Infants, 2nd Edn., p. 308, note (*x*); Macpherson on Infants, pp. 252, 255.

[6] Simpson on Infants, 2nd Edn., chap. viii.

[7] See *Witte* v. *Palin*, L. R., 14 Eq., 251.

[8] See *Barnes* v. *Ross* [1896], A. C., 637.

In awarding maintenance to a minor out of his own income the Court will often grant a sum larger than is requisite for his own maintenance and education, when his father or mother is in indigent circumstances,[1] or where his infant brothers or sisters are unprovided for,[2] or where he has relatives dependent upon him.[3] Provision for the maintenance of the minor's wife or children must also be included in the allowance given to the minor.[4] Similarly in awarding maintenance for a female minor provision must be made for the support of her husband, if he be without means.

Wife and children.

Increase of allowance. Provision for special expenditure.

The Court has full power to increase the amount of maintenance allowed for the minor according as his needs require it, and additional provision may sometimes be granted for special expenditure, as for instance, the marriage of the minor or of female relatives dependent upon him, or for keeping up the worship of the ancestral deity, or for the performance of the *shrads* of the minor's ancestors, or for the purpose of providing for all such other proper obligations as the minor, were he an adult, would be morally bound to perform.

Past maintenance.

Maintenance can be given at any time after the minor has come into possession of the property, and past maintenance may also be given; but such past maintenance must have reference not to the time when the order is made, but to the time when the money was expended for the maintenance of the minor.[5] An allowance for past maintenance can only be granted for sums actually expended. It is not necessary, however, to take an account of the actual sums expended by the guardian, but an enquiry should be made as to the scale of expenditure upon

[1] *Allen* v. *Coster*, 1 Beav., 202; Macpherson on Infants, p. 250.

[2] *Wellesley* v. *Beaufort*, 2 Russ., 28; *Tweddell* v. *Tweddell*, Turner & Russell, 13.

[3] *Ante*, p. 222.

[4] In the case of Mahomedans, where the wife is too young for matrimonial intercourse, she has no right of maintenance from her husband, whether she be living in his house or not; *In the matter of Khatija*, 5 B. L. R., at p. 567; *Kolashun* v. *Didar Buksh*, 24 W. R. Cr. R., 44; *ante*, p. 65.

[5] *Chaplin* v. *Chaplin*, 3 Peere Wms., 368.

which the minor was maintained, and an allowance can be granted upon that scale.[1]

As a general rule, the father will not be allowed anything in respect of past maintenance, but this may be done under special circumstances, as where he is in embarrassed circumstances, or has incurred a debt for maintenance, or is not of ability, having regard to other children unprovided for.[2]

With respect to persons other than the father, past maintenance can only be allowed where it was expended with the intention of claiming the amount as a debt, or with the expectation of being recouped out of the minor's property.[3] If trustees have a discretionary power to allow maintenance, past maintenance will be given, if they have not exercised the power,[4] or if by mistake as to the amount of the income they have allowed only a small part of it.[5]

In addition to its power to make an allowance for the past maintenance of a minor, the Court can sanction the payment of any sums which have been expended for necessaries supplied to the minor.[6]

Period.

As a general rule, unless a time be fixed by the instrument, if any, which provides for the minor's maintenance, the allowance will be given up to the time when the minor attains the age of majority.

Accumulations of maintenance.

Where the minor is entitled to the whole income of the fund given for his maintenance, such part of the income as is not applied for his maintenance belongs to him absolutely, or to his representative, in the case of his death ; but where the minor is not entitled to the income of the fund, but only to maintenance thereout, the surplus goes to the person entitled to the capital.[7]

To whom allowance is to be paid.

The guardian of the minor's person will generally be entitled to receive the allowance made for his maintenance,

[1] *Bruin* v. *Knott*, 1 Phillips, 572.
[2] Simpson on Infants, 2nd Edn., pp. 312, 313.
[3] *Joyce* v. *Cottrell*, L. R., 12 Eq., 566.
[4] *Maberly* v. *Turton*, 14 Ves. Jun., 499 ; see *ante*, p. 224.
[5] *Stopford* v. *Canterbury*, 11 Sim., 99.
[6] Act IX of 1872, sec. 68, *ante*, pp. 19 to 23.
[7] Simpson on Infants, 2nd Edn., pp. 317, 318.

but the Court will not permit money allowed for future maintenance to be paid over to any person who is not within its jurisdiction.[1] The Court will, however, in some cases, where the minor is residing outside the jurisdiction, appoint a guardian within the jurisdiction, *pro tanto*, to receive and remit the amount allowed for the minor's maintenance to a guardian resident outside of the jurisdiction.[2]

Dividends of stock in name of minor.

In cases which would have been governed by English law as administered by the late Supreme Courts,[3] the High Courts have a statutory power to order dividends of stock[4] standing in the name of a minor to be paid for his maintenance, education or otherwise for his benefit. The order can be made on a petition of the guardian, or if there be no guardian it can be made in a suit.[5]

Powers of Divorce Court.

A Divorce Court has power to provide for the maintenance of children, the marriage of whose parents is the subject of a suit.[6]

Liability of mother.

Except that she is liable for an offence under the criminal law,[7] a mother is neither directly nor indirectly liable for the maintenance or education of her children, whether legitimate or illegitimate.[8]

Malabar and Canara.

The following provision of the Malabar Marriage Act, 1896[9] applies to persons domiciled in the Presidency of Madras following the Marumakkatayam or the Aliyasantana law of inheritance.

"The wife and children shall be entitled to be maintained by husband or father as the case may be. In a civil suit by the wife or children for maintenance, it shall be open to the husband or father to plead all defences open

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[1] *Logan* v. *Fairlee*, Jacob, 193.

[2] See *Coverdale* v. *Greenway*, Bignell, 11; *In re Meakin*, I. L. R., 21 Bom., 137.

[3] This expression would apparently include all European British subjects resident in the Province, and all others who are resident within the original jurisdiction of a High Court; see Morley's Digest, Vol. I, p. 22 of the Introduction. See *ante*, p. 39, note 5.

[4] *In re Alexander*, Perry's Oriental Cases, p. 162, an order was made in respect of money in the hands of the Accountant-General of Bombay.

[5] Act XXIV of 1841 applying 11 Geo. IV & 1 Wm. IV, chap. 65, sec. 32.

[6] Act IV of 1869, secs. 41 to 44.

[7] *Ante*, p. 53.

[8] *Ruttingér* v. *Temple*, 4 Best & Smith, 491.

[9] Act IV (M. C.) of 1896, sec. 17.

in such a suit to a Hindu governed by the ordinary Hindu law. Nothing herein contained shall affect the right of the wife and children to be maintained by the tarwad."

Except he be removed from acting as their guardian,[1] or has lost his right by waiver or acquiescence,[2] a father is entitled to control the secular and religious education of his children.[3] The fact of his insolvency or poverty will not, provided he be of good character, deprive him of such right, even when his children would, on account of a special provision or fund for their benefit, obtain greater pecuniary advantages, and a better education by being entrusted to a person other than their father.[4]

Right of father to control education.

The Court will not interfere with the custody of children by the father on account of his religious principles, nor will it interfere with the religious education of children by their father; but after the father's death the Court will, in many cases, interfere with the mode of religious education adopted by the mother or other guardian. According to law a father has a right to have his children brought up in his own religion, both during his lifetime and after his death.[5] This principle has, for a long time, been recognised by the English Courts;[6] and in *Skinner* v. *Orde*,[7] where the father of the minor

Religious education.

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[1] See *ante*, p. 97.

[2] See *ante*, p. 78, and *post*, p. 235.

[3] *In re Agar Ellis*, 24 Ch. D., 317.

[4] Macpherson on Infants, p. 142; *Exp. Hopkins*, 3 Peere. Wms., 154, *ante*, p. 78.

[5] See *In the matter of Himnauth Bose*, 1 Hyde, 111; *Reade* v. *Krishna*, I. L. R., 9 Mad., 391; *Queen* v. *Nesbitt*, Perry's Oriental Cases, 103.

[6] *Talbot* v *Shrewsbury*, 4 Mylne & Craig, 672; *Re Newbery*, L. R., 1 Eq., 431; on appeal L. R., 1 Ch., 263; *Hawksworth* v. *Hawksworth*, L. R., 6 Ch., 539.

[7] L. R., 4 P. C., 60; 10 B. L. R., 125; 14 Moo. I. A., 309. The decision of the High Court is reported in 2 N.-W. P. H. C. Reps., 275. In that case the Judicial Committee said: "The course of decisions in the English and Irish Courts of Chancery has been such as to lay it down as a matter of positive law of the Court that, in the matter of religious education, great and, in the absence of controlling circumstances, paramount weight should be given to the expressed or implied wishes of the deceased father. It was contended with some plausibility before their Lordships that this rule had its origin in the statutory power of English fathers to appoint guardians for their children. However this may be, their Lordships do not think it desirable, for the determination of this case, to refer

was a Christian, and the mother after the death of the father became a Mahomedan, and was bringing up the child in the Mahomedan faith, the Privy Council upheld the order of the High Court of the North-Western Provinces removing the child from the guardianship of the mother under the provisions of Acts XL of 1858 and IX of 1861, and placing her under a Christian guardian.

Right cannot be released.

The right of the father to control the religious education of his minor children is one given to him by the law not for his own benefit, but for that of his children. He cannot, therefore, release such right or bind himself to execute it in a particular way.[1]

Ante-nuptial agreements.

This rule has been held even to extend to an agreement made with respect to the religious education of their children by the father and mother before marriage, even though the marriage, but for such agreement, would not have taken place.[2] Such ante-nuptial agreements are, however, not uncommon in the case of marriages between persons belonging to different forms of the Christian religion; and they are, after the death of the father, often

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to or rely on any such rule. The Indian Act (IX of 1861) certainly does not expressly refer to any such right, and appears to have had one object in contemplation, the protection of the infant ward, and to have given the Judge (subject, of course, to appeal) the power, and to have imposed on him the duty, of doing what, in his judgment, is best for the infant, and no other power or duty. In India, however, all, or almost all, the great religious communities of the world exist side by side under the impartial rule of the British Government; while Brahman and Buddhist, Christian and Mahomedan, Parsee and Sikh are one nation, enjoying equal political rights, and having perfect equality before the tribunals, they co-exist as separate and very distinct communities, having distinct laws affecting every relation of life. The law of husband and wife, parent and child, the descent, devolution, and disposition of property, are all different, depending in each case on the body to which the individual is deemed to belong, and the difference of religion pervades and governs all domestic usages and social relations. From the very necessity of the case, a child in India, under ordinary circumstances, must be presumed to have his father's religion and his corresponding civil and social status; and it is therefore ordinarily and in the absence of controlling circumstances, the duty of the guardian to train his infant ward in such religion."

[1] *Andrews* v. *Salt*, L. R., 8 Ch., 622, at p. 636.

[2] See *Andrews* v. *Salt*, L. R., 8 Ch., 622.

of utility to the Court in determining whether the father's rights have been lost by waiver.

Waiver of right.

In some cases the father has been held to have waived by his conduct before his death his right that his children shall after his death be brought up in his religion, and under certain circumstances a father, during his lifetime, loses by waiver that right; but in the latter event, the Court would require stronger evidence of the waiver than in the former.[1]

The Court will be reluctant in any case to interfere with the wishes of the father, but it will do so even during his lifetime where the impressions produced on the child's mind by the course of education which he is receiving are so great and permanent as to induce the Court to fear lest any attempt at altering them would do more harm than good, and would end in unsettling the child's faith altogether, and so produce a fatal result in that respect.[2]

Where the father has expressed no wishes as to the religious education of his child and the child has for a long time been brought up in a religion different from that of the father, the Court may decline to interfere, if a change would unsettle the child's faith altogether.[3]

Departure from rule.

The Court will depart from the rule that the child should be brought up in his father's religion, if it can be shewn clearly that the welfare of the child requires such departure, or that the father has otherwise wished or directed.[4]

In the English cases the conflict has ordinarily been between different churches of the Christian religion, but in this country it usually arises between on the one hand the Christian, and on the other, the Hindu or Mahomedan religion.[5] This distinction would make it the more

[1] As to waiver by father of his right to custody, see *ante*, p. 78.

[2] *Per* James, L. J., in *Hawksworth* v. *Hawksworth*, L. R., 6 Ch., 539; see also *Lyon* v. *Blenkin*, Jac., 260; *In re Agar Ellis*, 24 Ch. D., 317; *In re Newton* [1896], 1 Ch., 740.

[3] *Stourton* v. *Stourton*, 8 DeGex, Macnaghten & Gordon, 760.

[4] *In re McGrath* [1893] 1 Ch., 143. *In re Nevin* [1891], 2 Ch., 299.

[5] See *Reade* v. *Krishna*, I. L. R., 9 Mad., 391; *In the matter of Himnauth Bose*, 1 Hyde, 111; *Sarat Chun-*

necessary that the father's abandonment of his right should be proved by the clearest evidence. Only in a case where the interests of the minor peremptorily demand an order, would the Court permit the child of a Hindu or Mahomedan father to be brought up as a Christian or *vice versâ*.

What amounts to waiver.

There is no distinct rule to be laid down as to what kind of conduct constitutes a waiver on the part of the father,[1] but when a father has, during his lifetime, for some time permitted his children to be brought up in a religion differing from his own, and especially where he had done so sufficiently long for them to have imbibed the principles of that religion, it would, in questions arising after his death with respect to their religious education, be held that he had waived his right to have them brought up after his death in his own religion.

Effect of change of religion by guardian.

Where the father or other guardian changes his religion, he does not, as we have seen,[2] lose his right to the custody of the minor; but if the minor had been educated in his father's former religion sufficiently long enough to have imbibed the principles of that religion, the father or other guardian might, by changing his religion, lose the control of the religious education of the minor. Similarly a father or guardian who had abandoned all religious

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dra Chakarbati v. *Forman*, I. L. R., 12 All., 213; *In the matter of Saithri*, I. L. R., 16 Bom., 307; *Queen* v. *Nesbitt*, Perry's Oriental cases, 103. *Exparte Intiazoonnissa*, 2 Madras Notes of Cases, 107; *In the matter of Joshy Assam*, I. L. R., 23 Calc., 290, where the father had consented to his child being baptised as a Christian, he was not allowed to interfere with the custody of the persons to whom he had entrusted her and who had brought her up as a Christian.

[1] In *Hill* v. *Hill* (31 L. J. Ch., 505, 8 Jur. N. S., 609), where a Roman Catholic father (who lived till his eldest child was seven years old) allowed the mother, who was a Protestant, to have the exclusive charge of the education of the children during his life, and they were with his full knowledge brought up in the Protestant faith, Vice-Chancellor Wood held that he had abdicated his right to direct the religious education of his children; and in ordering a scheme to be settled for their education, disregarded a direction in his will that they should be brought up in the Roman Catholic faith. In their case the will was the only evidence of the father's desire, and he had by his acts during his lifetime abundantly shown a relinquishment of the religious education of the children to their mother.

[2] *Ante*, p. 82.

principles might be prevented from controlling the religious education of his ward.[1]

Religious and moral instruction.

In giving to his ward a religious and moral education, which he is bound to give him in addition to mere secular instruction,[2] the guardian must respect the wishes of the father of his ward,[3] so far as he is able to ascertain those wishes and by whatever means they may have been expressed.[4] Where the father has left no direction as to the mode of the religious education of his minor children, and did not during his life by his conduct waive his right to have them brought up in his own religion, it is the duty of the guardian to bring up the children in the father's religion.[5] The guardian should also, and the Court will, pay attention to the wishes of the mother with respect to the education of her children so far as they are not inconsistent with the wishes either expressed or implied of the father.[6]

Mother.

Where the parents of children are not of the same religion, the mother cannot, after the death of the father, even where he has left no directions on the subject, educate them in her own religion. She may have charge of them, but she is bound to bring them up in their father's religion.[7]

Discretion of guardian as to education.

The Court will not interfere with a guardian who properly exercises his discretion as to the education of his wards.[8] If in the exercise of his discretion the guardian should think it desirable that his ward should be educated at a school, he must choose a school for his ward.

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[1] *Ante*, p. 78.

[2] *Wellesley* v. *Beaufort*, 2 Russ., 29.

[3] *Campbell* v. *Mackay*, 2 Mylne & Craig, 34.

[4] *Skinner* v. *Orde*, L. R., 4 P. C., 60; 10 B. L. R., 125; 14 Moo. I. A., 309.

[5] *Hawksworth* v. *Hawksworth*, L. R., 6 Ch., 539; *Skinner* v. *Orde*, L. R., 4 P. C., 60; 10 B. L. R., 125; 14 Moo. I. A., 309.

[6] Simpson on Infants, 2nd Edn., p. 131. This rule would, in many cases, create a barrier between a widowed mother and her child; but apart from the right of the father to control the religious education of his minor children, it is manifestly for the benefit of minors that they should not, on the death of their fathers, be liable to a change of religion as result of the change of guardianship; *Hawksworth* v. *Hawksworth*, L. R., 6 Ch., p. 540, *note*.

[7] *Campbell* v. *Mackay*, 2 M. & C., 37.

[8] See *Talbot* v. *Shrewsbury*, 4 Mylne & Craig, 673.

Where the ward is of that age at which the Courts consider that a minor is capable of selecting the custody in which he shall remain,[1] the guardian might to some extent consult the wishes of his ward with respect to the place of education. But in other cases the guardian need not pay any attention to the wishes of the ward ; and even in cases where the ward is of an age to exercise a discretion with respect to the custody of his person, the Court would not interfere with the selection of a school by the guardian, unless there were reasons, other than the fact that the wishes of the minor had not been consulted for the Court's interference.[2] In addition to upholding a guardian's right to select a school for his ward, the Court might go so far as to send its own officer for the purpose of taking the ward to and keeping him at the school selected for him by his guardian.[3]

Disagreement of guardians.

Where guardians disagree as to the mode of their wards' education, the Court can make such order respecting the matter in difference as it thinks fit.[4]

Duty of guardian.

It is the duty of guardians to bring up their wards with feelings of affection and dutiful obedience to their parents, however bad and immoral those parents may be, and although the custody of their children may have been taken away from such parents on account of their bad conduct.[5] This duty is more clear where the character of the parent is liable to no reproach.

Courts of Wards.

As to the maintenance and education of wards of the Bengal Court of Wards, see *post*, Chap. XXXII, of wards of the Madras Court of Wards, see *post*, Chap. XXXV, and of wards of the Court of Wards of the North-Western Provinces, see *post*, Chap. XXXIV.[6]

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[1] *Ante*, p. 99.

[2] See *Hall* v. *Hall*, 3 Atk., 721.

[3] *Tremaine's case*, 1 Strange, 168. See Act VIII of 1890, sec. 25, *ante*, p. 202.

[4] Act VIII of 1890, sec. 43, *ante*, p. 161.

[5] See Simpson on Infants, 2nd Edn., p. 259 ; *Ex parte Ilchester*, 7 Ves., 382 ; and *Wellesley* v. *Beaufort*, 2 Russ., 43.

[6] The above remarks as to the duty of guardians to bring up wards in their father's religion apply equally to wards of the Court of Wards.

CHAPTER XXIII.

The Marriage of Minors.

The law, which governs the capacity of minors[1] to enter into a valid marriage, varies according to the religion of the contracting parties.

Hindus.

A person who is a minor according to Hindu law[2] cannot under that law enter of himself or herself into a valid contract of marriage, but may do so with the consent of his or her guardian. A marriage properly contracted with the consent of the guardian is indissoluble.[3]

The Hindu law and religion equally require that females should, before they arrive at puberty, be married to a suitable husband capable of procreating children.[4]

Right to give in marriage.

The law imposes upon certain of the relations of a female infant in succession the duty, and endows them with the right, of giving her in marriage. Where the person entitled to give the infant in marrage is absent at the time when she ought so to be given, or if he neglects or refuses to obtain a husband for her at the proper time, the person next entitled to give the infant in marriage would be justified in entering into a marriage contract on her behalf.[5]

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[1] The capacity to enter into marriage contracts is not affected by the Indian Majority Act, *ante*, p. 10.

[2] See Banerjee's Law of Marriage and Stridhan, p. 39.

[3] *Kateeram Dokanee* v. *Gendhenee*, 23 W. R. C. R., 178.

[4] *King* v. *C. Kistnama Naik*, 2 Strange's Notes of Cases, 89; *Ball Gunga* v. *Dhurmdoss Nurseedass*, Bom. S. D. A. Rep., 27th July, 1841. *Jumoona* v. *Bamasoondari*, I. L. R., 1 Calc., 289; L. R., 3 I. A. 72; Strange's Hindu Law, vol. i, p. 36; Menu, chap. ix, sloka 88; Vyavastha Darpana, p. 651.

[5] *King* v. *C. Kistnama Naik*, 2 Strange's Notes of Cases, 89; *Ball Gunga* v. *Dhurmdoss Nurseedass*, Bom. S. D. A., 27th July 1841.

Right of father.

If the father be alive, and not incapacitated by insanity or any other cause disqualifying him from exercising the office of guardian to his children, it is for him to give his daughter in marriage.[1]

Delegation of right.

A father can delegate to another his authority to give his daughter in marriage, and such delegation may be sometimes presumed from the father's conduct.[2]

Devolution of right in default of father.

After the death of the father, or in case of his having permanently emigrated or having become a recluse,[3] the right and duty of selecting a husband for a female infant devolves, in the first place, upon her paternal male relations,[4] namely, on her paternal grandfather; then on her brother; and in default of brothers on her paternal relations as far as the tenth degree of affinity in order of proximity; then on the mother, the maternal grandfather, the maternal uncle, and the relatives in the maternal line.[5] Failing these the paternal relatives beyond the tenth degree would presumably be entitled to give the infant in marriage.

A guardian appointed by a Court would not, as such, have any power over the marriage of his Hindu ward, but must apply to the Court for authority.

The expressed wishes of a dead father should always be, as far as possible, attended to,[6] and after the death of the

[1] *Golamee Gopee Ghose* v. *Juggessur Ghose*, 3 W. R. C. R., 193; *Ex parte Jankypersaud Agurwallah*, 2 Boul., 28 & 114; *Nundolall Bhugwandass* v. *Tapeedass*, 1 Borradaile, 14.

[2] Such delegation was presumed in a case (*Golamee Gopee Ghose* v. *Juggessur Ghose*, 3 W. R. C. R., 193), where the father had made over the care and custody of his daughter when two years of age to another, left her with him till the proper time for her to be married had arrived, allowed the person with whom he left her to give her in marriage, and did nothing for four years to impeach the question of the validity of the marriage. *In Modhoosoodun Mookerjee* v. *Jadub Chunder Banerjee*, 3 W. R. C. R., 194, it was held that where the father was a Coolin Brahmin, married to several wives, and only occasionally visited the mother of the infant, the duty and right of giving the infant in marriage devolved upon the mother. In that case the marriage had actually taken place. See cases *post*, p. 241, note 3.

[3] See *ante*, p. 79.

[4] *Shridar* v. *Hiralal Vithal*, I. L. R., 12 Bom., 480.

[5] *Ex parte Jankypersaud Agurwallah*, 2 Boul., 114; Strange's Hindu Law, vol. i, p. 36; and vol. ii, pp. 28 and 30; Macnaghten's Hindu Law, vol. ii, chap. vii, case ii, Edn. 1828, p. 204. Shamachurn's Vyavastha Darpana, p. 651.

[6] This is, however, rather a matter of moral, than of legal, obligation

father the mother ought to be consulted as to the disposal of an infant daughter in marriage.[1]

The female kindred may dispose of a minor in marriage with the consent of those entitled to the right.[2]

Effect of absence of consent.

A marriage otherwise legally contracted, and performed with the necessary ceremonies is not necessarily invalidated by the absence of consent of the guardian entitled to give such consent;[3] but the Courts would have power to set aside a marriage entered into without such consent, and would probably do so, where the interests of the child have been disregarded and the marriage brought about by a person having no pretence of authority.[4]

The absence of such consent would, except in special circumstances, induce the Court to restrain the performance of a marriage for which preparations had been made, or were threatened, but which had not actually taken place,[5] and it would be an answer to a suit to obtain damages for the breach of a marriage contract.[6]

Force & fraud.

Where the marriage has been brought about by force or fraud, it would on that account be invalid, apart from any question of the want of consent.[7]

It is by no means clear that any effect could be given to it by a Court except perhaps when a contract had been made by the father. See *Juggernathpersad Agurwallah* v. *Jankypersad*, 2 Boul., 28.

[1] *Namaseevayan Pillay* v. *Annammai Ammal*, 4 Mad. H. C. Rep., 339.

[2] It was held in the case of *Ram Bunsee Koonwaree* v. *Soobh Koonwaree*, 7 W. R. C. R., 321; 2 Ind. Jur. N. S. 193, that a paternal grandmother, with the assent of the nearest male kindred on the father's side, has, in preference to the stepmother, the right to dispose of a minor in marriage.

[3] *Khusalchand Lalchand* v. *Bai Mani*, I. L. R., 11 Bom., 247; *Brindaban Chandra Kurmokar* v. *Chandra Kurmokar*, I. L. R., 12 Calc., 140; *Venkatacharyulu* v. *Rangacharyulu*, I. L. R., 14 Mad., 316; *Modhoosoodun Mookerjee* v. *Jadub Chunder Banerjee*, 3. W. R. C. R., 194.

[4] *Aunjona* v. *Prahlad Chandra Ghose*, 6 B. L. R., 243; 14 W. R., 403. Banerjee's Marriage and Stridhan, p. 53. See however *Khusalchand Lalchand* v. *Bai Mani*, I. L. R., 11 Bom., 247.

[5] *Nanabhai* v. *Janardhan*, I. L. R., 12 Bom., 110; *Khusalchand Lalchand* v. *Bai Mani*, I. L. R., 11 Bom., 247.

[6] *Nundloll Bhugwandass* v. *Papredass*, 1 Borradaile, 14.

[7] *i. e.*, fraud on the minor. Mere fraud on the guardian, such as in *Venkatacharyulu* v *Rangacharyulu*, I. L. R., 14 Mad., 316, where the mother falsely stated that she had the father's permission, would not invalidate the marriage. See *Khusalchand Lalchand* v. *Bai Mani*, I. L. R., 11 Bom., 247.

Termination of right.

The right of giving in marriage does not extend beyond the time when the girl has attained her majority according to the Hindu law.[1]

Remarriage of Hindu widows.

The remarriage of a minor Hindu widow, whose marriage has not been consummated, can, if not entered into with the consent of her father, or, if she has no father, of her paternal grandfather, or failing him, of her mother, or, failing all these, of her elder brother, or, failing also brothers, of her next male relative, be declared void by a Court of law ; but the necessary consent is to be presumed until the contrary is proved, and no marriage can be declared void after it has been consummated.[2] The remarriage of a minor widow, whose marriage has been consummated, requires no consent but her own.[3]

Marriage of male minors.

With respect to male minors, there is not the same obligation upon fathers and other guardians under the Hindu law to provide for their marriage. Inasmuch as amongst Hindus marriage completes for the man the regenerating ceremonies, expiatory, as is believed, of the sinful taint that every child is supposed to contract in the parent's womb, and is for Sudras the only one that is allowed,[4] and also inasmuch as marriage, being the means of obtaining legitimate male issue, is a matter of religious obligation amongst Hindus, it is the duty, though not a peremptory one, of the father or guardian to provide a wife for his son or male ward. The relatives are entitled to dispose of a boy in marriage, in the same order as in the case of girls.[5]

Malabar Marriage Act, 1896.

In the case of Hindus domiciled in the Presidency of Madras following the Marumakkatayam or the Aliyasantana

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[1] See *ante*, p. 2. The Indian Majority Act does not affect questions of marriage, see *ante*, p. 10.

[2] Act XV of 1856, sec. 7. The same section renders those who knowingly abet a marriage made without the necessary consent liable to imprisonment for a term not exceeding one year, or to fine, or to both. The Court can by injunction prevent a contemplated marriage without the required consent.

[3] Act XV of 1856, sec. 7.

[4] Strange's Hindu Law, vol. i, p. 35.

[5] See Macnaghten's Hindu Law, vol. ii, chap. vii, case 2, Edn. 1828, p. 204, *ante*, p. 240.

Law of Inheritance a party to a sambandham,[1] who is a minor must have obtained the consent of his or her legal guardian to the registration of the sambandham as a marriage.[2] But the absence of such consent does not invalidate the marriage.[3] The required declaration must be signed by the guardian.[4]

Mahomedans.

The Mahomedan law does not impose upon guardians any religious obligation to provide suitable marriages for their wards. It gives them the power to contract marriages; but except where the person giving him in marriage is the father or paternal grandfather,[5] the minor has, on attaining the age of majority, *i.e.*, on arriving at puberty,[6] the option of either ratifying the marriage or repudiating it.[7]

On attaining puberty a minor can contract an irrevocable marriage.

Right of giving in marriage.

The right of giving a male or female minor in marriage falls upon a line of guardians, different from that to which the management of the minor's property is entrusted, and also from that to which the custody of his person is confided.

Father and grandfather.

The father is first entitled to give his child in marriage, and after him the paternal grandfather (how high soever)[8] is so entitled.[9] The executor of the father or grandfather has no power to contract a minor in marriage even though he be appointed for that purpose by the testator.[10]

Devolution of right in default of father and grandfather.

In default of the father and grandfather the next entitled to give a Mahomedan minor in marriage are the

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[1] *i.e.*—an alliance between a man and a woman by reason of which they, in accordance with the custom of the community to which they belong or either of them belongs, cohabit or intend to cohabit as husband and wife; Act IV (M. C.) of 1896, sec. 2.

[2] Act IV (M. C.) of 1896, sec. 3.

[3] Act IV (M. C.) of 1896, sec. 15.

[4] Act IV (M. C.) of 1896, sec. 11.

[5] *Mulka Jehan* v. *Mahomed Ushkurree Khan*, L. R., I. A., Sup. Vol. 192; 26 W. R. C. R. 26; *Badal* v. *Queen-Empress*, I. L. R., 19 Calc., 79. Baillie's Digest, vol. ii, p. 7; Macnaghten's Mahomedan Law, chap. vii, princ. 18, p. 58.

[6] *Ante*, pp. 3 and 4.

[7] See *post*, p. 246.

[8] *i. e.* great grandfather and so forth.

[9] Baillie's Digest, vol. i, p. 45.

[10] Baillie's Digest, vol. i, p. 47, vol. ii, p. 291. The executor may, of course, contract the minor in marriage when he happens to be the natural guardian. *Ibid.*

other agnate relatives in the order in which they would be entitled to inherit the estate of the minor. After the grandfather comes the full brother ; then the half-brother by the father's side ; then the son of the full brother ; then the son of the half-brother by the father's side ; then the full uncle ; then the half uncle by the father's side ; then the son of the full uncle ; then the son of the half uncle by the father's side and their descendants ; then the father's full paternal uncle ; then his paternal half uncle by the father's side ; then the sons of both in the same order ; then the grandfather's full paternal uncle ; then his paternal half uncle by the father's side, and then the sons of both in the same order ; then the sons of a more distant paternal uncle.[1] After these the mother follows : and failing her the near uterine relatives, who might inherit from the minor, attain the right in order of proximity.[2] These are the full sisters ;[3] then the half-sister by the father's side ; then the half-brother and sister by the mother, and then their children. Then come paternal aunts, maternal uncles, then maternal aunts, then the daughters of maternal uncles, then the daughters of maternal aunts. After these people the right of providing for the marriage of a minor devolves, according to Mahomedan law, upon the *mowla-ool-mowalat*, or successor by contract ;[4] then on the ruling authority,[5] or its representative the *kazi*. If there be no *kazi* present, then the minor, if of sound discretion, may himself or herself

[1] Baillie's Digest, vol. i, pp. 45 and 46.

[2] Tagore Law Lectures, 1873, pp. 329 and 331. Baillie's Digest, vol. i, p. 46.

[3] The false or maternal grandfather is preferred to the sister according to Aboo Haneefa.

[4] A successor by contract is thus described:—If a person of unknown descent says to another "Thou art my kinsman and shall be my successor when I am dead, and thou shall pay for me any fine and ransom to which I may become liable," and if the other says "I accept," then it is a valid contract according to our doctrine ; Tagore Law Lectures, 1873, p. 92.

[5] Baillie's Digest, vol. i, pp. 46, 47. The ruling authority is now represented by the Courts of Law *ante*, pp. 61, and 176, note 6. As their marriages may be repudiated by minors on attaining majority, the Courts would not be likely to arrange for their marriages, although it might sanction provision being made for marriage expenses.

contract the marriage, which, however, may be repudiated by him or her on attaining puberty.[1]

The consent of the nearest guardian in the above scale is essential to the validity of the marriage of a minor,[2] but if the nearest guardian be incapacitated by reason of minority, insanity, profligacy, absence at such a distance as to preclude him from acting[3] or any circumstances which prevent him from providing for his ward a suitable marriage at the proper age,[4] the next

Circumstances causing devolution of right.

[1] Macnaghten's Mahomedan Law, Precedents, chap. vi, case 16, p. 265.

[2] Macnaghten's Mahomedan Law, Precedents, chap. vi, case 15, p. 263 and case 18 note, p. 267 ; Principles, chap. vii, princ. 16, p. 58. In *Kureemoonissa* v. *Ruheem Ali*, 2 Sel. Rep. 233 ; 2nd Edn. 299, it was held by the Bengal Sudder Court that if a boy and girl, both minors, in the presence of witnesses enter into a marriage contract as their own act, and the husband acknowledge himself indebted so many thousand rupees to the wife, and the guardians of the minors, being also present, give their consent either at first or afterwards, or if the minors, on coming of age, confirm the agreement, in either case the marriage is valid ; but that if the guardians were not present at the marriage, and after hearing of it did not give their consent, and if the minors on coming of age do not acknowledge the marriage as valid, then it is void.

[3] It is not easy to say how far a guardian must be distant in order to give validity to a marriage contract effected by a more *remote* guardian. In the Hedaya (vol. i, Bk. ii, chap. iii) we find this : "If the parents or other first natural guardians of an infant should be removed such a distance as is termed *gheebat moonkatat*, it is in that case lawful for the guardian next in degree to contract the infant in marriage." And again we find "By the absence termed *gheebat moonkatat* is to be understood the guardian being removed to a city out of the track of the caravans, or which is not visited by the caravan more than once in every year ; some, however, have defined it to signify any distance amounting to three days' journey." In Macnaghten's Mahomedan Law, Precedents, chap. vi, case 14, p. 263, a case is mentioned where it was held that a distance of three days' journey is sufficient to justify the next guardian in contracting the infant in marriage. A day's journey or stage is explained in the *Rusail-ool-Arkan* to mean as far as a person may be able to travel, at a moderate pace, in the shortest day of the year between morning and the setting of the sun ; Macnaghten's Mahomedan Law, Precedents, chap. v, case 9, p. 207. This arbitrary rule would not, probably, be now recognised by the Courts of law, and whenever the legal guardian is within a reasonable distance from the place of residence of the minor, his consent to the marriage contract would be deemed to be necessary.

[4] For instance, where the guardian is in jail, and not likely to be released for a long period ; *Kaloo* v. *Gureeb-oollah*, 10 W. R. C. R. 12 ; 13 B. L. R., note to p. 163. As to the loss of the right by apostacy, see *ante*, p. 82.

guardian becomes entitled to enter into the marriage contract.[1]

Repudiation of marriage.

A marriage entered into with the consent of the father or paternal grandfather cannot be repudiated[2] except it be manifestly to the disadvantage of the child,[3] in which case it can be set aside either by the guardian next in order, or by the minor on attaining puberty.[4]

In the case of marriages entered into by themselves, or by a guardian other than a father or paternal grandfather, it is for minors on attaining puberty to determine whether they will accept or repudiate their marriages.[5]

According to the Shiahs the marriage has no effect except it be expressly ratified after majority, or there be facts from which such express ratification can be presumed.[6] According to the Sunnis it is effectual unless avoided by express dissent immediately after majority.

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[1] Baillie's Digest, vol. i, p. 49.

[2] Macnaghten's Mahomedan Law, Principles, chap. vii, princ. 18, p. 58; *Mulka Jehan* v. *Mahomed Ushkuree Khan*, L. R., I. A., Sup., vol. 192; 26 W. R. C. R. 26.

[3] As where it is grossly unequal or the dower is fraudulently improper, or one of the contracting parties is suffering from an incurable disease; see Ameer Ali's Mahomedan Law, vol. ii, p. 327.

[4] Ameer Ali's Mahomedan Law, vol. ii, p. 334.

[5] See *Kureemoonissa* v. *Ruheem Ali*, 2 Sel. Rep. 233, 2nd Edn. 299, *ante*, p. 245, note 2. According to the Sunnis at any rate, if a minor continues to live with her husband after arriving at puberty, and permits him to consummate the marriage, she loses her right to it; see per Ameer Ali J., in *Badal* v. *Queen Empress*, I. L. R., 19 Calc., 79.

[6] See Baillie's Dig, Part II, chap. i, sec. 2, pp. 9 and 10 and chap. iv, p. 294; Macnaghten's Mahomedan Law, Principles, chap. vii, princ. 18; *Badal* v. *Queen Empress*, I. L. R., 19 Calc., 79, per Ameer Ali, J. In the case of *Mulka Jehan* v. *Mahomed Ushkurree Khan*, L. R., I. A. Sup. Vol. 192; 26 W. R. C. R. 20, the Privy Council said:—"The law of the Sunis appears to adopt a very stringent rule requiring the option of dissent to be declared by the girl as soon as puberty is developed. But the doctrine of the Shiahs seems to be that the matter ought to be propounded to her, so that she may advisedly give or withhold her assent. This is a rational provision of law, for assent ought to be the expression of the mind and will of the girl upon the marriage, when it is brought to her notice and is present to her understanding. It appears by the extracts from Baillie, Part II (chap. i, sec. 2, pp. 9 and 10 chap. iv, p. 294) that the girl's assent if a virgin, may be inferred from her silence when the matter is propounded to her; but a woman, who is not, must be put to the trouble of giving expression by actual speech to her assent. The mention of this distinc-

A guardian can avoid a marriage which has been entered into by his ward without his consent, but he must do so before the birth of issue.[1]

Dower.

It has been held that, according to Mahomedan law a minor who is adolescent, can legally contract for dower,[2] and that after attaining puberty he can bind himself by acknowledging a contract for dower made either by himself or on his behalf.[3] The guardian is bound to see that, on the marriage of his ward, a proper provision is made for her dower.

Divorce.

A minor cannot under Mahomedan law effect a valid divorce.[4]

Parsees.

The Parsee Marriage Act requires the consent of the father or guardian to the marriage of persons under the age of twenty-one years,[5] and makes a marriage without such consent invalid.[6]

A marriage without such consent can be ratified, when the husband or wife attains the age of twenty-one years.[7]

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tion (which involves a concession to the modesty of a virgin) strongly indicates the view of the Shiah school that assent must be evidenced in such a way as to leave no doubt that it is the act of the mind and will. Their Lordships, however, do not mean to hold that it must, in all cases, be shown that the question of the marriage was distinctly propounded to the girl. They have no doubt that it may, in some cases, be presumed from the conduct and demeanour of the parties after they have attained puberty and mature understanding. Circumstances may obviously exist which would properly lead to the inference that the marriage had been recognised and ratified, although no distinct assent could be proved."

[1] Macnaghten's Mahomedan Law, Principles, chap. vii, princ. 16 & 17, p. 58, and Precedents, chap. vi, cases 15 and 17.

[2] *Abdul Karim* v. *Fazilatunnissa*, 5 Sel. Rep. 75, 2nd Edn., 90.

[3] *Kureemoonnissa* v. *Ruheem Ali*, 2 Sel. Rep. 233, 2nd. Edn., 299.

[4] See Tagore Law Lectures for 1873, p. 389. Macnaghten's Mahomedan Law, Principles, chap. viii, princ. 12, p. 63.

[5] Act XV of 1865, sec. 3. Where the husband sought to set aside the marriage nineteen years after it had taken place, the formal consent of the uncle and the tacit consent of the father was held sufficient to validate the marriage; *Peshotam Hormasjee Dustoor* v. *Meherbai*, I. L. R., 13 Bom., 302.

[6] Sec. 3. A suit to set aside the marriage can be brought in the High Court. It need not be brought in the Special Court. *Peshotam Hormasjee Dustoor* v. *Meherbai*, I. L. R., 13 Bom., 302.

[7] See *Peshotam Hormasjee Dustoor* v. *Meherbai*, I. L. R., 13 Bom., 302.

It follows from the Act, and from the practice of infant marriage prevalent among Parsees in Western India, that a marriage with the requisite consent is binding on a minor.[1]

It has been held that a Parsee cannot, until he is twenty-one years of age, bring, of himself a suit for divorce under sec. 30 of the Parsee Marriage Act.[2]

Europeans, &c. The duty of guardians of minors, who are neither Hindus nor Mahomedans, is confined to preventing them from entering into unfitting marriages,[3] and to providing out of their estate for the reasonable expenses of suitable marriages.

The Legislature has enacted the following provisions for the marriages of Christians.

Christians. By the Indian Christian Marriage Act, 1872,[4] which consolidates the law relating to the solemnization in India of the marriages of persons professing the Christian religion,[5] when one of the persons intending marriage is a minor (that is to say, a person who is under the age of twenty-one years and is not a widower or widow[6]), every Minister receiving the notice required by the Act to be given by one of the persons intending marriage shall send by the post or otherwise a copy of such notice to the Marriage Registrar of the district, or if there be more than one Registrar of such district, to the Senior Marriage Registrar. The Marriage Registrar or Senior Marriage Registrar, as the case may be, on receiving any such notice shall affix it to some conspicuous place in his own office, and the latter shall further cause a copy of the said notice to be sent to each of the other Marriage Registrars in the same district, who shall likewise publish the same in the above manner.[7]

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[1] See *Peshotam Hormasjee Dustoor* v. *Meherbai*, I. L. R., 13 Bom., 302.

[2] Act XV of 1865; *Sorabji Cowasji Polishvala* v. *Buchoobai*, I. L. R., 18 Bom., 366.

[3] See *post*, p. 258; *Barker* v. *Taylor*, 1 C. & P., 101.

[4] Act XV of 1872, sec. 15.

[5] This includes not only adults, who profess the Christian religion, but also their children, who are in law presumed to follow their father's religion; *Queen-Empress* v. *Veeradu*, I. L. R., 18 Mad., 230.

[6] Act XV of 1872, sec. 3.

[7] *Ibid*, sec. 16.

The father [1] if living, of any minor, or if the father be dead, the guardian of the person[2] of such minor, and in case there be no such guardian, then the mother of such minor may give consent to the minor's marriage.[3]

No marriage can be solemnized without such consent, unless no person authorized to give such consent be resident in India.[4]

Guardian may prohibit issue of certificate.

The person whose consent is so required may[5] prohibit the issue of the certificate, which the Act[6] makes a condition precedent to the solemnization of a marriage, and on the receipt of such notice of prohibition the Minister shall not issue his certificate, and shall not solemnize the said marriage until he has examined into the matter of the prohibition, and is satisfied that the person prohibiting the marriage has no lawful authority for such prohibition, or until the said notice is withdrawn by the person who gave it.[7]

Issue of certificate.

When either of the persons intending marriage is a minor, and the Minister is not satisfied that the consent of the person whose consent to such marriage is required has been obtained, such minister shall not issue such certificate required by the Act until the expiration of fourteen days after the receipt by him of the notice of marriage.[8]

Native Christians.

A marriage cannot be held between Native Christians, unless the age of the man exceed sixteen years, and that of the woman exceed thirteen years.[9]

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[1] The right of the father is not one which can be lost or which in consequence of his unfitness would devolve on any one else.

[2] This includes a guardian appointed by the father as well as a guardian appointed by the Court.

[3] Act XV of 1872, sec. 19.

[4] *Ibid.* Failing the father a testamentary or Court appointed guardian of the person, and the mother, there is no one who can consent. It might be necessary in some cases to obtain an appointment of a guardian by the Court in order that the requisite consent may be given. If the father is insane, or otherwise incapable of giving his consent, there is not, as under 4 Geo. IV. c. 76, sec. 17, power to obtain an order from a Court. If he be living in India, the marriage cannot be held except before a Marriage Registrar on an order made under sec. 45, see *post*, p. 251.

[5] Act. XV of 1872, sec. 20.

[6] *Ibid*, sec. 17.

[7] *Ibid*, sec. 21.

[8] *Ibid*, sec. 22.

[9] *Ibid*, sec. 60.

The consent of the father, guardian, or mother,[1] if there be one alive, is necessary up to the age of eighteen years, but not beyond.[2]

Marriage by Registrar.

In the case of a marriage to be solemnized by, or in the presence of, a Marriage Registrar, when one of the parties intending marriage is a minor,[3] the Marriage Registrar must within twenty-four hours after the receipt by him of notice of the marriage send, by post or otherwise, a copy of such notice to each of the other Marriage Registrars (if any) in the same district, who shall affix the copy in some conspicuous place in his own office.[4]

When either of the parties is a minor, the Marriage Registrar cannot give a certificate unless one of the parties intending marriage appears personally before him and makes oath (amongst other things necessary), that the consent or consents to such marriage required by law has or have been obtained thereto,[5] or that there is no person resident in India authorized to give such consent as the case may be[6]; and until fourteen days after the entry of the notice of marriage has expired.[7]

Petition to High Court to order certificate in less than 14 days.

When one of the parties intending marriage is a minor, and both such parties are at the time resident in any of the towns of Calcutta, Madras and Bombay, and are desirous of being married in less than fourteen days after the entry of the required notice[8] they may apply by petition to a Judge of the High Court for an order upon the Marriage Registrar to whom the notice of marriage has been given, directing him to issue his certificate before the expiration of the fourteen days. On sufficient cause being shown, the Judge may, in his discretion, make an order upon such Marriage Registrar, directing him to issue his certificate at any time to be mentioned in the said order before the expiration of the fourteen days. The Marriage

[1] Act XV of 1872, sec. 19, *ante*, p. 249.
[2] *Ibid*, sec. 60.
[3] *Ante*, p. 248.
[4] Act XV of 1872, sec. 39.
[5] *Ibid*, sec. 19, *ante*, p. 249, and secs. 42 and 44.
[6] Act XV of 1872, sec. 42.
[7] *Ibid*, sec. 41.
[8] *Ibid*, sec. 41, *ante*, p. 248.

Registrar on receipt of the order must issue his certificate in accordance therewith.[1]

Protest against issue of certificate.

Any person whose consent to the marriage would be required[2] may enter a protest against the issue of the Marriage Registrar's certificate, by writing, at any time before the issue of the certificate, the word "forbidden" opposite to the entry of the notice of such intended marriage in the marriage notice book, and by subscribing thereto his or her name and place of abode, and his or her position with respect to either of the parties, by reason of which he or she is so authorized.[3]

Effect of protest.

When such protest has been entered, no certificate can be issued until the Marriage Registrar has examined into the matter of the protest, and is satisfied that it ought not to obstruct the issue of the certificate, or until the protest be withdrawn by the person who entered it.[4]

Where guardian is insane or unjustly withholds consent.

If any person whose consent is necessary to a marriage before the Registrar is of unsound mind, or if any such person (other than the father) without just cause withholds his consentto the marriage, the parties intending marriage may apply by petition, where the person, whose consent is necessary, is resident within any of the towns of Calcutta, Madras and Bombay, to a Judge of the High Court, or if he is not resident within any of the said towns, then to the District Judge,[5] and the Judge may examine the allegations of the petition in a summary way, and if upon examination such marriage appears proper the Judge shall declare the marriage to be a proper marriage. Such declaration is as effectual as if the person whose consent was needed had consented to the marriage, and if he has forbidden the issue of the certificate, such certificate shall be issued.[6]

Petition when Registrar doubts authority of person forbidding.

When the Registrar is not satisfied that the person forbidding the issue of the certificate is authorized by law so to do, he must apply by petition, where his district is within any of the towns of Calcutta, Madras and Bombay

[1] Act XV of 1872, sec. 43.
[2] *Ante*, p. 249.
[3] Act XV of 1872, sec. 44.
[4] Act XV of 1872, sec. 44.
[5] See Act XV of 1872, sec. 85.
[6] Act XV of 1872, sec. 45.

to a Judge of the High Court, or if such district be not within any of such towns then to the District Judge.

The petition must state all the circumstances of the case, and pray for the order and direction of the Court. The Judge is to examine into the allegations of the petition and the circumstances of the case, and if, upon such examination, it appears that the person forbidding the issue of the certificate is not authorized by law so to do, the Judge shall declare that the person forbidding the issue of the certificate is not authorized, and thereupon the certificate shall be issued.[1]

Liability for frivolous protest.

Every person entering a protest with the Marriage Registrar against the issue of a certificate on grounds which the Registrar or Judge declares to be frivolous and such as ought not to obstruct the issue of the certificate, is liable for the costs of all proceedings in relation thereto and for damages to be recovered by suit by the person against whose marriage such protest was entered.[2]

Effect of want of consent.

In cases to which the Indian Christian Marriage Act (XV of 1872) applies, the absence of the consent of the father or guardian does not of itself avoid the marriage.[3]

Marriage by license of High Court.

The High Courts have also power[4] to issue marriage licenses for the marriage in Christian Churches of persons subject to their Ecclesiastical jurisdiction; but before doing so they will, in the case of minors,[5] require the consent of their guardians.[6]

Act III of 1872.

Act III of 1872, which provides a form of marriage for persons who do not profess the Christian, Jewish,

[1] Act XV of 1872, sec. 48.

[2] *Ibid*, sec. 49.

[3] See Act XV of 1872, sec. 77; *R. v. Birmingham*, 8 B. & C., 29.

[4] *See* Belchambers' Rules and Orders, p. 312, note.

[5] Although the ages under which a person is to be considered a minor for the purposes of Act XV of 1872 (sec. 3, *ante*, p. 248 and sec. 60, *ante*, p. 250) do not strictly apply, a High Court would have regard to those ages, in opening a marriage license.

[6] In a case where the parties were minors, and the father of each of the parties was dead, a marriage license for the Church of England was issued, with the consent of the mother of the lady, and upon an affidavit of the gentleman that his mother, his surviving parent, was in England, and there was no one in India authorized to consent to the marriage; *Re Lovell*, Belchambers' Practice, p. 413.

Hindu, Mahomedan, Parsee, Buddhist, Sikh or Jain religion, does not permit the marriage of any person under the age of twenty-one years without the consent of his or her father or guardian, and even with such consent it does not permit the marriage of a man under eighteen, or a woman under fourteen years of age.[1]

Objection.

Any person may object to any marriage under this Act on the ground that the parties have not reached the prescribed age, or that they have not received the necessary consent to their marriage. The nature of the objection made shall be recorded in writing by the Registrar in the register, and shall, if necessary, be read over and explained to the person making the objection, and shall be signed by him or on his behalf.[2]

The Act further provides: "*Section* 7.—On receipt of such notice of objection, the Registrar shall not solemnize the marriage until the lapse of fourteen days from the receipt of such objection, if there be a Court of competent jurisdiction open at the time, or, if there be no such Court open at the time, until the lapse of fourteen days from the opening of such Court."

Suit by objector.

The person objecting to the intended marriage may file a suit in any Civil Court having local jurisdiction (other than a Court of Small Causes) for a declaratory decree, declaring that the marriage would contravene the conditions prescribed by the Act.[3] If the objection be not reasonable and *bonâ fide*, the Court, in which the suit is filed, may inflict on the objector a fine not exceeding one thousand rupees.[4]

Settlement on marriage.

The guardian of a female minor who is a European, or brought up as such, should ordinarily see that a proper settlement of her property is made on her marriage. In England, where the husband by marriage acquired rights in the property of his wife, this duty was a most

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[1] Sec. 2. If either party has not completed the age of 21 years, the necessary declaration must be signed by his or her father or guardian, except in the case of a widow; sec.

[2] Sec. 6.

[3] Sec. 7.

[4] Sec. 8.

necessary one, and although in this country no person by marriage acquires any interest in the property of the person whom he or she marries, it is clear that the influence which the husband exercises over his wife, together with the want of capacity of the wife herself, is calculated to endanger the wife's interest in her property.

Succession Act.

The Indian Succession Act[1] provides that "the property of a minor may be settled in contemplation of marriage, provided the settlement be made by the minor with the approbation of the minor's father, or, if he be dead or absent from British India, with the approbation of the High Court."[2]

The amount to be settled on a minor about to marry would depend on the circumstances of each particular case, and it is not possible to lay down any fixed rule either with respect to the proportion of the amount settled to the income of the minor's estate, or with respect to the way in which it is to be settled. The High Courts in settling the minor's property under the powers given to them by the Succession Act, would probably be guided by the rules which are followed by the High Court in England in settling on marriage the property of its wards.

Terms of settlement.

The settlement should maintain the interest of the minor modified to some extent by a consideration of what the minor is to gain by the marriage. According to the English practice, as Mr. Simpson points out in his work on the Law of Infants :[3] "The usual outline of a settlement would probably be, that the husband would take the first life-interest in his own property, and the wife the first life-interest in hers, to her separate use without power of anticipation. Then the issue of the marriage would be provided for in the usual way, and in default of issue, the property of the husband is generally limited to

[1] X of 1865, sec. 45.

[2] The application to the High Court should be by petition. There is nothing to prevent a minor on attaining majority ratifying a marriage settlement not made with the necessary approbation ; see *ante*, chap. xxi.

[3] Second Edition, p. 342. Davidson's Conveyancing, 3rd Edn., vol. iii, 95 n.

him absolutely; and the property of his wife, if she survive her husband, to her absolutely; if she die in his lifetime, according as she shall appoint by will, and in default of appointment, to her statutory next-of-kin. The more recent practice, it seems, is to give a power of appointment to the wife whether she survives her husband or not."[1] In most cases a husband will be given some interest in his wife's property, except he may have married her in contempt of Court, in which case he may, unless the contempt be not an aggravated one, be excluded from any participation therein.[2]

Where the fund is small, it is sometimes paid over to the husband, or given to him to be employed by him in trade. The Court will generally sanction what the minor's relations consider as a prudent and safe settlement of his property.

Breach of agreement for marriage.

An agreement for a marriage cannot be specifically enforced against either the guardian or the ward;[3] but it has been held[4] that a suit for damages will lie against a Hindu guardian, where the agreement has been broken, and there seems to be no reason why a similar suit should not lie in the case of any other guardian, at any rate where he has been guilty of fraud or misrepresentation in inducing the other party to enter into the agreement.[5]

It has been held that, amongst Hindus at any rate, a suit will lie to recover money paid or property given as a

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[1] See *Smith* v. *Illife*, L. R., 20 Eq. 666.

[2] Where the woman is the offending party, the Court will not exclude her from all interest in her husband's property; *Re Murray*, 3 Drury and Warren, 83.

[3] *In the matter of Gunput Narain Singh*, I. L. R., 1 Calc., 75; *Umed Kika* v. *Nagindas Narotamdas*, 7 Bom. H. C. Rep., O. C. J., 122. In the cases in Borrodaile's reports there cited, the Court directed the contract of marriage to be carried into effect, and decreed that if it be not carried into effect within a fixed time the defendant should pay damages.

[4] *Umed Kika* v. *Nagindas Narotamdas*, 7 Bom. H. C. Rep., O. C. J., 122; *Mulji Thakersey* v. *Gomti*, I. L.R., 11 Bom., 412; *Purshotamdas Tribhovandas* v. *Purshotamdas Mangaldas Nathubhoy*, I. L. R., 21 Bom., 23. See *Nowbut Singh* v. *Ladkooer*, 5 N.-W. P. H. C. R., 102.

[5] See *Asgar Ali Chowdry* v. *Mahabhat Ali*, 13 B. L. R., App. 34; *Jogeswar Chakrabutti* v. *Panchkauri Chakrabatti*, 5 B. L. R., 395; 14 W. R. C. R., 154.

consideration for a marriage the contract for which has fallen through,[1] and this would apply whether or not the arrangement be void as being against public policy.[2]

Marriage brocage.

Any agreement by which the guardian obtains a pecuniary or other consideration for the marriage of his ward is void according to English law,[3] and in this country also it is void[4] with regard at any rate to persons who are not Hindus or Mahomedans, and do not belong to races, amongst whom such arrangements may be usual.

The High Courts are not quite at one, as to whether such arrangements are against public policy in the case of Hindus. The High Court of Madras, in the case of *asura* marriages at any rate,[5] supports such arrangements, when they are otherwise unobjectionable. The High Court of Bombay[6] considers them to be contrary to public policy.

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[1] *Ramchand Sen* v. *Audaito Sen*, I. L. R., 10 Calc., 1054, following *Jogeswar Chakrabatti* v. *Panchkauri Chakrabatti*, 5 B L. R., 395; 14 W. R. C. R., 154; *Rambhat* v. *Timmaya*, I. L. R., 16 Bom., 673; *Mulji Thakersey* v. *Gomti*, I. L. R., 11 Bom., 412.

[2] Act IX of 1872, sec. 65.

[3] Simpson on Infants, 2nd Edn., p. 124.

[4] See Act IX of 1872, sec. 24.

[5] In *Vistanalkhan* v. *Saminathan*, I. L. R., 13 Mad., 83, which was a suit by the father of the bride against the uncle of the bridegroom on a bond for the amount payable on a marriage in the *asura* form; Wilkinson, J., said, "In the present state of Hindu society, I am not prepared to hold that the receipt by a Hindu father of money in consideration of his giving his daughter in marriage is in every case without distinction immoral or contrary to public policy. Each case must be decided on its own merits." See *Vaithyanatham* v. *Gangarazu*, I. L. R., 17 Mad., 9.

[6] In *Dulari* v. *Vallabdas Pragji*, I. L. R., 13 Bom., 126, which was a suit for damages by a woman, in whose charge a girl had been left, against a man who had promised to marry the girl, and pay the plaintiff a sum of money, Jardine, J., following, *Pitamber Ratansi* v. *Jagjivan Hansraj*, I. L. R., 13 Bom., 131, held that the agreement was immoral, and against public policy, and that the suit was not maintainable. In *Pitamber Ratansi* v. *Jagjivan Hansraj*, I. L. R., 13 Bom., 131, which was a suit for money due on an arrangement by a guardian for payment on marriage, Scott, J. said (at p. 136): "Was this contract, in so far as it promised money payment for the negotiation of a marriage by a third party, immoral and contrary to public policy? In England such a contract would not be enforced at law; *Kean* v. *Potter*, 3 Peere Wms., 76; Story's Equity, Jurisprudence, plac. 260, 261. It would be held to be against public policy and public interest as having a tendency to cause matrimony to be contracted as a mere matter of bargain and sale, "a kidnapping into conjugal servitude" as one of the Judges expressed it. It was contended that such an argument

In Bengal the decisions are not uniform,[1] but the weight of authority seems to be in favour of a contract which is fair, and does not amount to a bargain and sale.

There is not the same objection to a payment of money by the guardian to the proposed bridegroom.[2] An arrangement to pay money to a person other than the guardian is, according to the High Courts of Madras and Bombay, contrary to public policy, even in the case of Hindus.[3]

An agreement in restraint of the marriage of a minor is valid.[4] Agreements in restraint of marriage.

It is the duty of the guardian of a minor's estate to make suitable provision out of such estate for the proper marriage of his ward,[5] and, in the cases of Hindus, of the Duty of guardian.

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did not apply to India. The *asura* form of marriage, which is legal among the lower castes, is no doubt nothing more than the purchase of a wife from her father by the husband. As long as the custom of infant marriages is maintained, mutual affection and choice cannot be the basis of marriage. But I do not think it follows that the English rule can have no *raison d' être* in India. Although custom or local law in this country may be defective in the matter of marriage, that is no good reason why an additional evil should be engrafted upon them. I had no proof given me that marriage brocage is an established usage in India. I can find no recognition of it in the reports. I think it is immoral and against public policy, even in the present state of matrimonial relations in India." As to the *asura* form of marriage, see *In the goods of Nathibai*, I. L. R.,2 Bom., 9.

[1] *Jogeswar Chakrabatti* v. *Panchkauri Chakrabatti*, 5 B. L. R., 395; 14 W. R. C. R., 154; *Lallunmonee* v. *Nobinmohun Singh*, 25 W. R. C. R., 32; *Ram Chand Sen* v. *Audaito Sen*, I. L. R., 10 Calc., 1054; contrâ *Juggernath Persad* v. *Janky Persad*, 2 Boul., 28.

[2] Illustration (*a*) of sec. 65 of Act IX of 1872 seems to assume that there would be no objection to such an arrangement.

[3] *Vaithyanatham* v. *Gangarazu*, I. L. R., 17 Mad., 9; *Pitambar Ratansi* v. *Jagjivan Hansraj*, I. L. R., 13 Bom., 131. See, however, *Jogeswar Chakrabatti* v. *Panchkauri Chakrabatti*, 5 B. L. R., 395; 14 W. R. C. R., 154.

[4] Act IX of 1872, sec. 26.

[5] The amount to be expended must necessarily vary in accordance with the position and wealth of the minor, and the customs of the community to which he belongs. Europeans, and those brought up as such, do not usually spend large amounts on their marriage ceremonies, whereas Hindus especially and Mahomedans are more lavish on those occasions. The High Court of Bengal in determining, when occasion requires, what amount should be expended on the marriage of a Hindu minor, has been always guided by Hindu ideas, without regard to the more parsimonious expenditure of European weddings. A guardian would not ordinarily be justified in heavily encumbering an estate to raise marriage expenses. As to the right of a Hindu guardian to charge the estate for this purpose, see *ante*, p. 169.

ward's dependent female relations. After a father's death the reasonable marriage expenses of his daughters, and their maintenance until marriage are under Hindu law a charge upon his estate.[1]

Fitness of marriage.

It is the duty of a guardian by every means in his power to prevent his ward entering into an unsuitable marriage.[2] It is not possible to lay down any rule as to what is, and what is not, an unsuitable marriage. Congruity of age and equality of rank and fortune are the chief means of determining the fitness of a marriage of a European ward.

Marriage of guardian and ward.

Except there be any objection arising from nearness of relationship, or from the exercise of force or undue influence,[3] there is nothing in the law to prevent a guardian himself marrying his ward.[4]

Power of Court. Injunction to restrain marriage.

In cases where a guardian has been appointed by a Court, such Court can give all necessary directions, and make proper provision for the marriage of the ward ;[5] and in any case a Civil Court can prevent by injunction[6] the improper marriage of a minor subject to its jurisdiction, and in some cases would remove a guardian who is conniving at the improper marriage of his ward.[7]

Under the English law, where a minor is a ward of Court,[8] a person marrying such ward, or attempting, to bring about a marriage of the ward without the sanction

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[1] *Preajnarain* v. *Ajodyaprsad*, 7 Sel. Rep. 513 ; 2nd Edn., 602. As to the right of a guardian to apply to the Court for directions when he is in difficulty, see *ante*, pp. 160, 161.

[2] *Barker* v. *Taylor*, 1 C. & P., 101.

[3] *Harford* v. *Morris*, 2 Hagg. Con. Rep. at p. 436.

[4] The Mahomedan law does not allow the *Kazi* who is (see *ante*, p. 244) after her relatives and the *mowla-ool-mowalat*, entitled to give a female minor in marriage, to marry her himself, or to give her in marriage to his son, but this prohibition does not extend to other guardians.

[5] See Act VIII of 1890, secs. 33 and 43, *ante*, pp. 160, 161.

[6] *Wellesley* v. *Beaufort*, 2 Russ., 29. This would ordinarily be by suit, but where the minor is a ward of Court (*ante*, pp. 126, 127), there is no reason why proceedings should not be taken at any rate in the High Courts by petition in the proceeding in which the minor has been constituted a ward of the Court. In the District Courts also an application may be made under Act VIII of 1890, sec. 43, *ante*, p. 161.

[7] *Ante*, p. 109.

[8] *Ante*, pp. 126, 127.

of the Court is liable to be punished for contempt of Court. This rule has not, so far as can be ascertained from the reports, been acted upon in India, although the High Courts might be entitled to adopt it.

Maintenance of guardian's rights.

The Court will not interfere with the reasonable exercise of his discretion by the guardian, and will maintain the rights given to guardians by the law, but in maintaining such rights, the Court may put the guardian upon such terms as may be beneficial to the ward.[1]

Wards of Courts of Wards.

As to the marriage of wards of the Bengal Court of Wards, see Court of Wards Rules, sec. VIII (e), Rule 5, *post*, Chap. XXXII. As to the marriage of wards of the Madras Court of Wards, see Act XXI of 1855, sec. 9, *post*, Chap. XXXV.

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[1] *Shridhar* v. *Hiralal Vithal*, I. L. R. 12 Bom., 480, *ante*, p. 201.

CHAPTER XXIV.

Powers of Courts over Property of Minors.

Powers of High Courts.

In addition to their powers of controlling the action of guardians appointed by them,[1] and of giving sanction to the disposal of property under the Guardians and Wards Act,[2] the High Courts of Bengal, Madras, and Bombay in the exercise of their ordinary original civil jurisdictions possess powers over the estates of minors similar to those which were exercised by the Court of Chancery in England at the time of the establishment of the Supreme Courts.

Sale, mortgage, application, and investment.

They can direct or authorise a sale or mortgage of the minor's property for necessary purposes, and can provide for the application or investment of funds belonging to him.[3] This can be done whether or not there be a suit pending to which the minor is a party.[4]

The only cases, apparently, where the English Court of Chancery will allow the sale or mortgage of minor's property is for the purpose of paying necessary expenses which have been incurred with reference thereto, such as necessary repairs and improvements, or to pay off legacies or other charges on the estate, or to pay the costs of a suit relating to the estate, or the expenses of renewing renewable leaseholds.[5]

Powers of Court under Guardians and Wards Act.

A Court cannot in the exercise of its jurisdiction under the Guardians and Wards Act deal with property

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[1] *Ante*, pp. 160, 161.

[2] *Ante*, p. 155.

[3] A suit is not necessary, see *ante*, p. 222.

[4] See *ante*, pp. 122, 222.

[5] Simpson on the Law of Infants, 2nd Edn., p. 362.

belonging to or claimed by the minor except in strict accordance with that Act.[1]

District Courts.

The Courts in the district might perhaps in a suit properly framed have power to direct the sale of the property of minors, but it would rarely be necessary to exercise this power.[2]

In any case in which the minor's property could have been sold *in invitum* by the Court, if he had been an adult, a Court can order a sale.[3]

Execution of transfer.

When a sale is ordered by the Court, the Court may itself execute, or may direct one of its officers to execute, a transfer in the name of the minor,[4] but the Court cannot enter into any covenant for title, for quiet enjoyment or otherwise, on behalf of a minor.[5]

Duty of purchaser.

As to the duty of the purchaser in the case of a sale by order of the Court, see *ante*, p. 157, and *post*, Chap. XXVII.

Power of High Court to vest property in purchaser.

In cases to which the English law is applicable[6] a High Court, when it directs the sale of immovable property, may make an order vesting such property in the purchaser or other person as it may think fit.[7]

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[1] In *Babaji* v. *Shesh Giri*, I. L. R., 6 Bom., 593, it was held that the Court could not under Act XX of 1864 attach and divide joint property.

[2] Ordinarily the appointment of a guardian and sanction to dispose of the property under Act VIII of 1890 sec. 29, would be the better course to pursue.

[3] As to sales in execution of decrees against minors, see *post*, chap. xxvii.

[4] See Act XIV of 1882, secs. 261 and 262. The following rule applies to the Original Side of the Bengal High Court (Belchambers' Rules and Orders, Rule 436). "If any person certified by the Registrar to be a necessary party to a conveyance be a minor, * * * an order may be obtained, directing the Registrar to execute the conveyance for him and in his name. * * The application shall be on summons, and shall be supported by an affidavit or affirmation of the facts, and it shall be shown that the person required to execute the conveyance was certified by the Registrar to be a necessary party, and that the conveyance has been approved of such party or by the Registrar. Unless otherwise ordered, the costs of such application * * shall be part of the costs of the sale." See *Ramchunder Dutt* v. *Dwarkanath Bysack*, I. L. R., 16 Calc., 330. In an unreported case (see Belchambers' Rules and Orders, p. 174), Kennedy, J., held that Act VIII of 1859, sec. 202 (corresponding with sec. 261 of Act XIV of 1882) did not apply to minors.

[5] *Ramchunder Dutt* v. *Dwarkanath Bysack*, I. L. R., 16 Calc., 330.

[6] See *ante*, p. 39, note 5.

[7] Act XXVII of 1866, sec. 32.

To order conveyance by minor heir or devisee.

In cases which would have been governed by English law as administered by the late Supreme Courts,[1] the High Courts can require a minor heir or devisee to convey estates ordered to be sold for payment of debts due by the person whose heir or devisee he is.[2]

As to the surrender and renewal of leases in which minors are interested, see *ante*, pp. 183, 184.

Investment of money paid into Court.

A Court has power to direct the investment of money belonging to a minor, which has been paid into Court in any suit or proceeding. It would ordinarily require the investment to be made in securities of the Government of India.[3]

Indian Trusts Act.

The Indian Trusts Act, 1882, which extends to the Madras Presidency, the North-Western Provinces, the Punjab, Oudh, the Central Provinces, Coorg and Assam, and may be extended to any other part of British India by the Local Governments, provides[4] that a trust may be created, with the permission of a principal Civil Court of original jurisdiction, by or on behalf of a minor; but subject to the law for the time being in force as to the circumstances and extent in and to which the author of the trust may dispose of the trust property.

Creation of trust.

Modification of trust.

Under the same Act,[5] where there is a minor beneficiary a principal Court of original jurisdiction may consent to the modification of the directions of the author of the trust.[6]

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[1] This expression has not received judicial interpretation, so far as can be ascertained, see *ante*, pp. 39 (note 5), and 183. It is wide enough to include all persons within the original jurisdiction of a High Court and all European British subjects in the Province. So far as appears from the reports this statute has fallen into disuse in this country.

[2] Act XXIV of 1841, secs. 4 and 5, applying sec. 11 of 11 Geo. IV & 1 Wm. IV, Chap. 47. If a minor refuses to execute, an attachment might issue against him; *Thomas* v. *Gwynne*, 8 Beav., 312, or an order can be made under secs. 261 and 262 of Act XIV of 1882. Having regard to these sections, it would seem unnecessary to make an order requiring the minor himself to execute a conveyance.

[3] See Belchambers' Rules and Orders, p. 242, Rule 605.

[4] Act II of 1882, sec. 7.

[5] Sec. 11.

[6] *i.e.*, a modification of the terms of the trust.

CHAPTER XXV.

SUITS AND PROCEEDINGS BY AND AGAINST MINORS.

A MINOR cannot himself institute any suit,[1] except a suit in a Presidency Small Cause Court for a sum of money not exceeding five hundred rupees, which may be due to him for wages or piece work or for work as a servant.[2] Civil suit or proceeding.

He cannot himself defend[3] any suit, prefer or defend an appeal,[4] or make or defend any application to a Civil Court.

There is nothing to prevent his instituting, prosecuting, or defending any criminal proceeding, or making any application to a Criminal Court, in his own name. Criminal proceeding.

A suit cannot be brought on behalf of or against a minor in a Village Court.[5] Village Courts

Every suit on behalf of a minor[6] must be instituted in his name by an adult person, who in such suit is called Suit on behalf of a minor.

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[1] Act XIV of 1882, secs. 440, 442 and 444; *Chyet Narain Singh* v. *Bunwaree Singh*, 23 W. R. C. R., 395.

[2] Act XV of 1882, sec. 32. See Act IX of 1872, sec. 70, *ante*, p. 24.

[3] Act XIV of 1882, secs. 443 and 444.

[4] *Ibid*, sec. 582.

[5] Act III (N.-W. P.) of 1892, sec. 9; Act I (M. C.) of 1889, sec. 13.

[6] A minor may sue for possession in the Mamlatdar's Court by a next friend; *Dattatraya* v. *Vaman*, I. L. R., 21 Bom., 88. If the plaintiff's minority be disputed, the Court should raise and try the question as a preliminary issue. Should it turn out on the trial of that issue that the plaintiff is not a minor, the Court can either direct that the plaint be taken off the file, or can allow the plaintiff to adopt the suit and sign and verify the plaint in accordance with law, (As to the proof of minority, see *post*, chap. xxix.) If no application is made to take the plaint off the file, and the case comes on for hearing, the Court may require the plaint to be amended, or may treat the next friend's name as surplusage; *Taqui Jan* v. *Obaidulla*, I. L. R., 21 Calc., 866. A suit may be brought on behalf of an infant *en ventre sa mère*; Macpherson on Infants, p. 364.

the next friend of the minor and may be ordered to pay any costs in the suit as if he were the plaintiff.[1]

Title of suit.

The plaint, and subsequent portions of the record, should, where the plaintiff is a minor, be intituled "A. B., a minor by C. D., his next friend *versus* E. F.;"[2] but, if the minor is really suing and there is a next friend properly acting on his behalf, the form of the title to the suit is immaterial.[3] It is, however, desirable that the original Court should, to prevent future complications, require the next friend to adopt the proper form.

Who may be next friend.

Except where the minor has a guardian appointed or declared by an authority competent in this behalf[4] any person[5] being of sound mind and of full age may

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[1] Act XIV of 1882, sec. 440. As to costs, see *post*, chap. xxvi. As to the course to be taken by a defendant when a minor brings a suit without a next friend, see sec. 442, *post*, p. 266. The absence of a next friend does not make the suit a nullity. The institution of a suit without a next friend prevents limitation running, and the suit may be proceeded with on a next friend being added; *Parikh Gokaldas* v. *Ravlal Jalam*, Bom. P. J. 1884, p. 262.

[2] *Mrinamoyi* v. *Juggodishuri*, I. L. R., 5 Calc., 450; *Durgachurn Shaha* v. *Nilmoney Dass*, I. L. R., 10 Calc., 134; s. c., *Durga Churn Shaha* v. *Gourmoni*, 13 C. L. R., 369; *Russick Doss* v. *Preonath Misree*, I. L. R., 10 Calc., 102; s.c., *Rasick Dass* v. *Jagudumba*, 13 C. L. R., 405. As to the title in suits by wards of the Court of Wards, see *post*, chap. xxxvi.

[3] See *Surjakant Acharjya* v. *Hemanta Kumari*, I. L. R., 20 Calc., 498; L. R., 20 I. A., 25. In *Bhabapershad Khan* v. *Secretary of State*, I. L. R., 14 Calc., 159, a Full Bench held that the question for the Appeal Court is whether on the construction of the plaint and written statements the minor is really a party to the suit. This decision overrules *Mrinamoyi* v. *Juggodishuri*, I. L. R., 5 Calc., 450; *Russick Dass* v. *Preonath Misree*, I. L. R., 10 Calc., 102; s.c., *Rasick Dass* v. *Jagudumba*, 13 C. L. R., 405, and *Shonai* v. *Monoram Mundul*, 11 C. L. R., 15, so far as those cases treat the objection as fatal; see also *Durgachurn Shaha* v. *Nilmoney Dass*, I. L. R., 10 Calc., 134; s.c., *Durgachurn Shaha* v. *Gourmoni*, 13 C. L. R., 369; *Alim Buksh* v. *Jhalo*, I. L. R., 12 Calc., 48.

[4] Act VIII of 1890, sec. 53A. This would include a guardian appointed by a Civil Court or by a Court of Wards. As to the duties of guardians with reference to the institution and defence of suits, see *ante*, pp. 135, 136.

[5] See *Dullabh De* v *Manu*, 5 Sel. Rep., 50, 2nd Edn., p. 61; *Obhoy Churn Mookerjee* v. *Punchanun Bose*, 15 Beng. S. D. A. 1462; *Nag Thakur* v. *Madnaji Sadashiv*, I. L. R., 8 Bom., 239; Macpherson on Infants, 364; Simpson on Infants, 2nd Edn., 469. The observations in *Russick Dass* v. *Preonath Misree*, I. L. R., 10 Calc., 102; s.c., *Rasick Das* v. *Jagudumba*, 13 C. L. R., 405, must be taken in connection with the facts of that case. There is nothing to prevent a married woman from being next friend of a minor

by presenting a plaint or petition on behalf of a minor constitute himself next friend of a minor and may act as such, provided his interest is not adverse to that of such minor, and he is not a defendant in the suit or proceeding,[1] and he resides in British India.[2] In suits under the Indian Divorce Act, a minor can only sue by a next friend to be approved by the Court.[3]

Suits for divorce, &c.

The Court can at any time before the hearing enquire whether a suit is for the benefit of a minor plaintiff, and whether his next friend is a proper person to act as such.[4]

Enquiry whether suit is for benefit of minor.

Should it appear that the suit is clearly not for the benefit of the minor, the Court can direct the plaint to be taken off the file. Should the suit be beneficial, but the next friend be objectionable, the Court may remove the next friend,[5] and will stay the proceedings, until a new next friend be appointed.[6]

When at the time of presentation of a plaint on behalf of a minor it appears to the Court that the interest of the next friend in any way conflicts with, or is likely to conflict with, the interest of the minor, the Court

Interest of next friend conflicting with that of minor.

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plaintiff; *Asirun* v. *Sharip Mondul*, I. L. R., 17 Calc., 488, overruling *Gurupershad Singh* v. *Gossain Munraj Puri*, I. L. R., 11 Calc., 733. A Mahomedan uncle can bring a suit on behalf of his nephew, although he cannot be guardian of his property under Mahomedan law; *Abdul Bari* v. *Rashbehari Pal*, 6 C. L. R., 413.

[1] Act XIV of 1882, sec. 445. It has been held (*Unnoda* v. *Stevenson*, 22 W. R. C. R., 291; s. c. in High Court, *French* v. *Baranashee Banerjee*, 8 W. R. C. R., 29), that, if a person whose interest is adverse to that of the minor does act as next friend or guardian for the suit, the minor is not bound by the suit, and can repudiate his liability thereunder on the ground that he was not properly represented in the suit. The minor would before the proceedings be set aside be required to shew that he had been prejudicially affected.

[2] See Act XIV of 1882, sec. 446; *Ganeshgiri* v. *Baba Ramapa*, Bom. P. J. 1881, p. 96.

[3] Act IV of 1869, sec. 49. The Court would ordinarily approve of the minor's guardian acting as his next friend. In other cases it would be more strict in seeing whether the suit is for the benefit of the minor. On it appearing at any stage of the suit that the Court did not approve of the next friend the petition should be taken off the file.

[4] See *Nalder* v. *Hawkins*, 2 M.&K., 249; Macpherson on Infants, p. 365; Simpson on Infants, 2nd Edn., p. 471.

[5] Act XIV of 1882, sec. 446, *post*, p. 275.

[6] Act XIV of 1882, sec. 449, *post*, p. 276.

should refuse to admit the plaint, unless it appear that the minor's interest will be prejudiced by delay in instituting the suit, in which case it should admit the plaint, and stay proceedings until the appointment of a new next friend.[1]

Suit *in formâ pauperis.*

A minor, who is possessed of no means can sue as a pauper, whether his next friend be solvent,[2] or a pauper.[3] In the case of his so doing the provisions of the Code of Civil Procedure relating to suits by paupers will apply.

Course when plaint filed without next friend.

If a plaint be filed by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader[4] or other person by whom it was presented. Notice of such application must be given to such person by the defendant, and the Court, after hearing his objections, if any, may make such order in the matter as it thinks fit[5].

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[1] As to the procedure when the fact of the interest of the next friend being adverse to the interest of the minor comes to the knowledge of the Court after the institution of the suit, see Act XIV of 1882, sec. 446, *post*. To take an instance of the jealousy with which the Court regards any conflict of interest between a minor and a person, acting on his behalf, and bound to protect his interest; by an order of the Supreme Court of Madras, it was ordered that when the property of infants is unprotected, the Registrar should, with the previous consent of the Court, institute proceedings on behalf of the infant for the purpose of protecting him and his property. It was held by the Privy Council that the order was void, it being against public policy to allow an officer of the Court to institute suits in the conduct of which he might have a direct personal interest; *Kerakoose* v. *Serle*, 3 Moo. I. A., 329.

[2] *Venkatanarasayya* v. *Achemma*, I. L.R., 3 Mad., 3; see also *Afzul Sultan*, Beng. S. D. A. Summary Cases, 78; and *Raj Rajindro Misser* v. *Bissonath Muttyloll*, Fulton, 490. Care would have to be taken to prevent the process of the Court being abused and a suit by a pauper next friend, which is entirely vexatious, might be stopped.

[3] *Golaupmonee.* v. *Prosonomoyee*, 11 B.L. R., 373; *Raj Rajindro Misser* v. *Bissonath Muttyloll*, Fulton, 490.

[4] "Pleader" means every person entitled to appear and plead for another in Court, and includes an advocate, a vakil, and an attorney of the High Court. Act XIV of 1882, sec. 2.

[5] Act XIV of 1882, sec. 442. The Court as a rule only strikes the plaint off the file where it appears on the face of the plaint that it was filed by a minor, or where it is proved that it was filed with the knowledge that the plaintiff was a minor, and with the intention of deceiving the Court and evading the payment of costs in case the plaintiff fails in his claim. When the fact of minority is a *bonâ fide* question of evidence (or of law) and the defendant's allegation is found correct, then the usual course is to suspend

In making such order the Court cannot require the minor's estate to pay the costs.[1] Costs.

An order taking the plaint off the file is appealable as a decree.[2] Appeal from order.

A defendant who waives the irregularity of the suit being brought without a next friend cannot afterwards take advantage of the objection,[3] and although the minor could repudiate the suit, there is nothing to prevent his adopting it and obtaining execution of a decree made in a suit in which he was not properly represented.[4] Waiver of objection.

If a minor has a guardian appointed or declared[5] by an authority competent in this behalf,[6] a suit[7] shall not be instituted on behalf of the minor by any person[8] other than such guardian, except with the leave[9] of the Institution of suit when plaintiff has guardian appointed by Court.

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all proceedings, and to allow sufficient time to enable the minor to be properly represented in the suit by a next friend: *Rattonbhai* v. *Chabildas* I.L.R., 13 Bom., 7. In *Beniram Bhutt* v. *Ramlall Dhukri*, I. L. R., 13 Calc., 189, it was held that sec. 442 only referred to a case where the plaint on the face of it appears to have been filed by a minor, but it is submitted that there is no reason why the section should be so limited. The mischief which the section has been enacted to cure, would be all the greater when the fact of the minority is suppressed. In exercising its discretion the Court should, in making an order, have regard to the interest of the minor. Generally an application to take the plaint off the file should not be encouraged unless it be made at an early stage.

[1] *Amichand* v. *Collector of Sholapur*, I. L. R., 13 Bom., 234.

[2] *Beniram Bhutt* v. *Ramlall Dhukri*, I. L. R., 13 Calc., 189.

[3] *Ex parte Brocklebank*, 6 Ch. D., 358, referred to in *Doorgamohun Dass* v. *Tahir Ally*, I. L. R., 22 Calc., 270; *Kamalakshi* v. *Ramasami Chetti*, I. L. R., 19 Mad., 127.

[4] See *Mahomed Hatum* v. *Jumeera*, 6 W. R. C. R., 183, and *Bird* v. *Pegg*, 5 Barn. & Ald., 418.

[5] Although the order has not been formally drawn up; *Mungniram* v. *Gursahainand*, I. L. R., 17 Calc., 347; L. R., 16 I. A., 195.

[6] See *ante*, chaps. xi and xiv.

[7] This includes any proceedings in the nature of a suit, as for instance, proceedings to enforce an award under the Civil Procedure Code; *Vasudev Vishnu* v. *Narayan Jagannath*, 9 Bom. H. C. Rep., 289.

[8] However nearly related to the minor, see *Madho Rao Apa* v. *Thakoor Persad*, 3 Agra H. C. Rep., 127; *Sitarambhat* v. *Sitaram Ganesh*, 6 Bom. H. C Rep., 250; *Dhunraj* v. *Roodur Pertab Singh*, 3 Agra H. C. Rep., 300; *Rutnee* v. *Rughober Dyal*, 2 Agra H. C. Rep., 278; *Zorawar Singh* v. *Jawahir Sing*, 3 Agra H. C. Rep., 165; *Boodhmul* v. *Gowree Sunkur*, 4 W. R. C. R., 71.

[9] It is more regular to place the permission formally on the record: *Mrinamoyee* v. *Jugodishuri*, I. L. R., 5 Calc., 450; 5 C. L. R., 361; but the omission to do so will not prevent the operation of the permission.

Court[1] granted after notice to such guardian and after hearing any objections which he may desire to make with respect to the institution of the suit,[2] and the Court shall not grant such leave unless it is of opinion that it is for the welfare of the minor that the person proposing to institute the suit in the name of the minor should be permitted to do so.[3]

Suits by wards of Court of Wards.

The Court has no power to give such leave in cases where a local law has specially provided for the way in

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A verbal permission may be sufficient, see *Newaj* v. *Maksad Ali*, I. L. R., 12 Calc., 131.

[1] This means a Court of competent jurisdiction in which it is proposed to institute the suit, not "the Court" as defined in sec. 4 (5) of the Guardians and Wards Act. The remainder of sec. 53 of Act VIII of 1890 shows that "the Court" has the same meaning as in chapter xxxi of the Code of Civil Procedure (Act XIV of 1882) which sec. 53 amends. "Court" would include a Provincial Court of Small Causes; *Khanto* v. *Nundram Nath*, 15 W. R. C. R., 369. It would also include an Appellate Court having jurisdiction in appeal from the Court in which it is proposed to institute the suit; *Hurendhur Lall Sahoo* v. *Rajendur Purtap Sahae*, 1 W. R. C. R., 260; *Taramonee* v. *Rajlukhee*, 2 Hay's Rep., 575. An order made under this section (53A) is not appealable as such, it can only come before an Appellate Court where there is an appeal from the decree or from an order having the effect of a decree (see Act XIV of 1882, secs. 2 and 591). Unless the first Court makes an improper use of its discretion an Appeal Court would not interfere: *Gounomonee* v. *Ram Komul Sandle*, 17 W. R. C. R., 144; *Nabadwip Chandra Sircar* v. *Kalinath Pal*, 3 B. L. R., App., 130.

[2] Under the old law (Acts XL of 1858 and XX of 1864), it had been held in some cases that although a formal order was more regular no formal leave was necessary, but that the leave of the Court could be inferred from the admission of the plaint, or from the Court having allowed the continuance of the suit or from other circumstances; see *Bhabapershad Khan* v. *Secretary of State*, I. L. R., 14 Calc., 159; *Purmessur Doss* v. *Bhela*, I. L. R., 9 All., 508; *Aukhil Chunder* v. *Tripoora Soonduree*, 22 W. R. C. R., 525; *Bonomalee Kesh* v. *Hungshessur Roy*, 17 W. R. C. R., 492; *Luchmiput Singh* v. *Amir Alum*, I. L. R., 9 Calc., 176; *Jogi Singh* v. *Kunj Behari Singh*, I. L. R., 11 Calc., 509; *Durga Churn Shaha* v. *Nilmony Doss*, I. L. R., 10 Calc., 134; s.c., *Durga Churn Shaha* v. *Gourmoni*, 13 C. L. R., 369; *Alim Buksh* v. *Jhalo*, I. L. R., 12 Calc., 48. Now the terms of the section shew that there must have been a formal adjudication *inter partes* as to the right to institute the suit. In the case of a suit against the guardian, notice to the guardian would not always be necessary, as for instance in a suit under secs. 35 or 36 of Act VIII of 1890, *ante*, p. 193.

[3] Act VIII of 1890, sec. 53A. As ordinarily the guardian appointed by the Court would be the right person to determine whether a suit would be instituted, permission would not be given unless it be clear that he is exercising his discretion erroneously or is negligent of the

which suits are to be brought; as for instance, a suit on behalf of a ward of a Court of Wards.[1]

Effect of institution of suit without leave.

A suit, which has been instituted without such leave, may be treated as a suit without a next friend, and therefore not binding the minor.[2] It may on that ground be dismissed.[3] Should the minor have obtained any benefit, he will not be allowed to avoid the proceedings without making restitution.[4]

Waiver of objection.

The objection to the irregularity may be waived by the minor, and he will, on attaining majority, be allowed to continue a suit, which was instituted by a next friend without authority.[5]

Conflict between guardians.

If there be a conflict between guardians, as to the right to institute a suit, the Court must determine the right. Ordinarily the guardian of his person would be entitled to bring suits affecting the ward's person, and the guardian of his property suits affecting such property.

Statement of guardianship in plaint.

The fact that the next friend has been appointed or declared to be guardian by competent authority should be stated in the plaint.[6]

Removal of next friend at instance of guardian appointed by Court.

If the next friend is not a guardian appointed or declared by an authority competent in that behalf, and an application is made by a guardian so appointed or declared who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers for reasons to be recorded by it that the guardian ought not be appointed the next friend of the minor.[7]

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interests of his ward, or is unable from poverty or other cause to take necessary proceedings.

[1] Act VIII of 1890, sec. 53E, amending Act XIV of 1882, sec. 464.

[2] *Ante*, pp. 266, 267. Cf. *Sreenath Koondoo* v. *Huranarain Mudduck*, 7 W. R. C. R., 399; *Durgapersad* v. *Keshopersad Singh*, I. L. R., 8 Calc., 656; L. R., 9 I. A., 27; and 11 C. L. R., 210.

[3] Cf. *Madhub Chunder Chowdhry* v. *Buktessuree*, 12 W. R. C. R., 102.

[4] *Vishnu Keshav* v. *Ramchandra Bhaskar*, I. L. R., 11 Bom., 130; *Daji Himat* v. *Dhirajram*, I. L. R., 12 Bom., 18.

[5] *Madhub Chunder Chowdhry* v. *Buktessuree*, 12 W. R. C. R., 102, and cases *ante*, p. 267, note 4.

[6] See Act XIV of 1882, sec. 50, illus. (c).

[7] Act VIII of 1890, sec. 53C. As leave to institute the suit can only be given on notice to the guardian

Duty of Court on presentation of plaint.

When a plaint is presented by a next friend other than a guardian appointed by the Court, the Judge should enquire whether a guardian has been appointed by the Court. The fact that no objection is raised or pressed by the opposite party does not relieve the Judge from the necessity of making such enquiries as may be available.

Subsequent discovery that next friend not guardian.

Should a plaint be admitted either through inadvertence, or from the Court not being aware that a guardian had been appointed, it should, as soon as the mistake is discovered, be taken off the file unless the interests of the minor will be prejudiced by the plaint being removed from the file, in which case should the guardian not be desirous of acting as next friend the Court can permit the next friend who instituted the suit to continue it.

Interest of co-plaintiffs adverse to minor.

The Court should not permit a minor to be joined as co-plaintiff in a suit with persons whose interests are adverse to his. When the Court finds that a suit has been so brought, it should require the minor to be made a defendant, and should appoint a guardian for the suit to protect his interests,[1] or it might provide for the conduct of the suit by the next friend of the minor independently of his co-plaintiffs.

Title of suit against minor.

In a suit against a minor, the minor should be described therein as defendant, and after a guardian for the suit has been appointed to watch his interests, the title of the suit should be "*A. B.* v. *C. D.* by *E. F.* his guardian for the suit," but if it be clear that the minor is really sued and that there be a guardian for the suit properly appointed, the form of the title to the suit is immaterial.[2] This applies also to minor respondents to appeals.

(*ante*, p. 268), this section will only apply where a guardian has been appointed after the institution of the suit, or notice has not been given under sec. 53A, or subsequent events have altered the circumstances. An order under this section is not appealable as such, see *ante*, p. 268, note 1.

[1] *Krishnabai Koru Depa Vaja* v. *Sonubai*, 2 Bom. H. C. Rep., 327.

[2] See *Kedar Prosono Lahiri* v. *Protap Chunder Talookdar*, I. L. R., 20 Calc., 11; *Harisaran Moitra* v. *Bhubaneswari*, I. L. R., 16 Calc., 40; L. R., 15 I. A., 195; *Suresh Chunder Wum Chowdhry* v. *Jugut Chunder Deb*, I. L. R., 14 Calc., 204; *Ganga*

Where a defendant is a minor, the Court[1] on being satisfied of the fact of his minority,[2] shall appoint a proper person to be guardian for the suit for such minor, to put in the defence for him, and generally to act on his behalf in the conduct of the case,[3] whether or not a guardian of his person or property has been appointed by a competent Court.[4] Appointment of guardian for the suit when defendant is a minor.

Such appointment should not ordinarily be made until after the summons has been served upon the minor.[5] When to be made.

Where an authority competent in that behalf has appointed or declared a guardian or guardians of the person Guardian appointed by Court to be preferred.

Prosad Chowdhry v. *Umbica Churn Coondoo*, I. L. R., 14 Calc., 754; *Sreenarain Mitter* v. *Kishen Soondery*, 11 B. L. R., 191; s. c., *Nogendro Chunder Mittro* v. *Kishen Soondery*, 19 W. R. C. R., 139; *Mongola* v. *Saroda*, 12 B. L. R., App., 2; 20 W. R. C. R., 48; *Abdool Hye* v. *Mitterjeet Singh*, 23 W. R. C. R., 348; *Komul Chunder Sen* v. *Surbessur Doss Goopto*, 21 W. R. C. R., 298; *Sherafutollah Chowdhry* v. *Abedoonissa*, 17 W. R. C. R., 374; *Grish Chunder Mookerjee* v. *Miller*, 3 C. L. R., 17; *Hari* v. *Narayan*, I. L. R., 12 Bom., 427; *Jogi Sing* v. *Kunj Behary Sing*, I. L. R., 11 Calc., 509; *Kunhammad* v. *Kutti*, I. L. R., 12 Mad., 90; *Natesayyan* v. *Narasimmayyar*, I. L. R., 13 Mad., 480; *Janki* v. *Dharamchand*, I. L. R., 4 All., 177; *Vasudev* v. *Krishna*, I. L. R., 20 Bom., 534.

[1] In the High Court of Bengal, Original Side, an order for the appointment of a guardian for the suit may be made by the Registrar; Rules of 18th February 1888.

[2] Where the defendant is sued as an adult and pleads his minority, or where he is sued as a minor and pleads that he has attained majority, proceedings in the suit should be stayed until the preliminary issue of minority has been decided. In this enquiry he should be represented by a guardian for the purpose of the enquiry; *Kasi Doss* v. *Kassim Sait*, I. L. R., 16 Mad., 344. If the result of the issue is that the defendant is found to be a minor, then no further proceedings can be taken until a guardian for the suit is appointed. If he is found to be of age, then his guardian for the suit (if any) should be discharged.

[3] Act XIV of 1882, sec. 443; *Rohilkund and Kumaon Bank* v. *Row*, I. L. R., 7 All., 490. The want of a formal order is not fatal to the suit, provided it appear on the face of the proceedings that the Court has sanctioned the appointment *Suresh Chunder Wum Chowdhry* v. *Jugut Chunder Deb*, I. L. R., 14 Calc., 204; *Kunhammad* v. *Kutti*, I. L. R., 12 Mad., 90. An *ex parte* order is not fatal to the suit, provided it appear that the minor is not prejudiced thereby. *Ibid.*

[4] *Dakeshur Pershad Narain Sing* v. *Rewat Mehton*, I. L. R., 24 Calc., 25.

[5] *Suresh Chunder Wum Chowdhry* v. *Jugut Chunder Deb*, I. L. R., 14 Calc., 204. This is the safer course, as the service of summons on the minor would generally ensure that the persons most likely to look after his interests would be aware of the suit. As to the Calcutta practice, see Belchambers' Rules and Orders. Rules 588, 589, *post*, p. 272; as to the service of summons, see *post*, p. 279.

or property, or both, of the minor, the Court shall appoint him or one of them, as the case may be, to be the guardian for the suit unless it considers, for reasons to be recorded by it, that some other person ought to be so appointed.[1]

Residence of guardian for suit.

The Court would not appoint as guardian for the suit any person who ordinarily resides out of British India, or so far off as to make it unlikely that the interests of the minor will be protected by him.

Petition for appointment of guardian for the suit.

An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.[2] Such application must be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in question in the suit adverse to that of the

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[1] Act VIII of 1890, sec. 53 B. An order under this section is not appealable as such, see *ante*, p. 268, note 1.

[2] An application on behalf of the minor must be by a next friend for the purposes of the application. It is desirable that an appointment should not be made at the instance of the plaintiff unless the minor, and his friends or relations, in whose care he may be, have failed to apply within a reasonable time after having notice of the suit. The practice in the High Court of Bengal, Original Side, is as follows :—(See Belchambers' Rules and Orders, Rules 588, 589.) If no application for the appointment of a guardian *ad litem* be made on behalf of a defendant [or respondent to any application] who is an infant the plaintiff, or applicant, may, if default be made by the defendant [or respondent] in appearing to the suit, or answering the application, apply, by summons at chambers, that a guardian *ad litem* may be appointed, and the Judge, on being satisfied that such defendant [or respondent] is an infant, so that he is unable of himself to protect his interests in the suit or application, may assign a guardian of such defendant [or respondent] by whom he may appear to and defend such suit, or answer such application.

No such order is to be made, unless it appears to the Judge, on the hearing of the application for the appointment of a guardian *ad litem*, that a copy of the summons was duly served, and that notice of such application was, after the time within which the defendant or respondent was required to appear or answer, and at least four clear days before the hearing of such application, served upon the person with whom, or under whose care such defendant or respondent was at the time of serving the summons; and in case of such defendant or respondent being an infant not residing with, or being under the care of, his father or guardian, that notice of such application was also served upon the father or guardian, if any, of such infant, unless the Court or a Judge, at the time of hearing the application, shall think fit to dispense with such last mentioned service.

minor,[1] and that he is a fit person to be so appointed.[2] It must also appear that the proposed guardian for the suit is willing to act.[3]

Appointment of officer of Court.

Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint one of its officers to be such guardian, provided that he has no interest adverse to that of the minor.[4] It may also appoint an attorney or pleader.

Indemnity to officer for costs.

In making such order the Court will ordinarily require the plaintiff to indemnify the officer, attorney or pleader, and also to make provision for his costs. It may also provide for such costs out of a fund in which the minor is interested. The Court may allow the plaintiff to add to his own costs such costs as under these circumstances he may be required to pay.[5]

Provision for costs out of estate.

Where the minor has property which is under the control of the Court provision can be made for the costs of his guardian for the suit thereout. Such provision could also be made for the costs of the next friend, but this would only be done in very exceptional cases, such as where a suit was urgently necessary, and no next friend willing to undertake the risk of costs could be found.

Who may be appointed.

A co-defendant of sound mind and of full age may be appointed guardian for the suit, if he has no interest adverse to that of the minor ;[6] but

[1] *i.e.*, whose interest, present or future, can in no way conflict within that of the minor.

[2] Act XIV of 1882, sec. 456.

[3] See *Jadow Mulji* v. *Chhagan Raichand*, I. L. R., 5 Bom., 306; *Babaji* v. *Maruti*, I. L. R., 5 Bom., 310; 11 Bom. H. C. Rep., 182; Rules of High Court N.-W. P., Rule 128.

[4] Act XIV of 1882, sec. 456; *Issur Chunder Gupto* v. *Nobokristo Gupto*, 7 C. L. R., 407. The appointment of an officer of the Court does not oust the Court's jurisdiction to try the suit; see *Jadow Mulji* v. *Chhagan Raichand*, I. L. R., 5 Bom., 306, which holds that sec. 3, cl. (*b*) of Act XV of 1880, supersedes the law as laid down on this subject in *Mohan Ishwar* v. *Haku Rupa*, I. L. R., 4 Bom., 638; see also *Narsingrav Ramchandra* v. *Luxumanrav*, I. L. R., 1 Bom., 318.

[5] See Belchambers' Practice, p. 265, and cases there cited. Act XIV of 1882, sec. 458, *post*, p. 278.

[6] A co-defendant in a partition suit or other suit where property would have to be divided between the parties would generally be ineligible.

neither a plaintiff nor a married woman can be so appointed.[1]

Order obtained without next friend or guardian may be discharged.

Every order[2] made in a suit or on any application before the Court, in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, if the pleader of the party, at whose instance such order was obtained, knew or might reasonably have known the fact of such minority, with costs to be paid by such pleader.[3]

Duty of Court when minor unrepresented.

Whenever a suit is brought by or against a minor, it is the duty of the Court to see that he is properly represented in such suit.[4] When the Court finds that he is not properly represented, it should either strike his name out of the suit,[5] or stay the proceedings until such time as he can be properly represented by a next friend or guardian for the suit as the case may be.[6] The latter course is generally the most desirable. The Court may also at the instance of the defendant take the plaint off the file.[7] The Court would have power to dismiss the suit on the ground that the minor was not represented,[8] but it could not give any costs against the minor or his estate,[9] and the dismissal of the suit would not prevent a fresh suit on the same cause of action.

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[1] Act XIV of 1882, sec. 457. A widow is eligible; *In the matter of the petition of Danappa*, 1 Bom. H. C. Rep., 2nd Edn., A. C. J., 134.

[2] This apparently does not include a decree; see Act XIV of 1882, sec. 2, definition of "order." As to setting aside a decree, see *post*, chap. xxvii.

[3] Act XIV of 1882, sec. 444. See *ante*, p. 266, note 4. As to waiver of objection, see *ante*, p. 267. As to the effect of a decree or order where a minor is not represented, see *post*, chap. xxvii.

[4] *Moorlee Dhur* v. *Nathonee Mahtoon*, 25 W. R. C. R., 184.

[5] *Radhakristo Surma* v. *Ramchunder Doss*, 11 W. R. C. R., 300; *Dhoondh Bahadoor Singh* v. *Priag Singh*, 17 W. R. C. R., 314.

[6] *Rollo* v. *Smith*, 1 B. L. R. O. C., 10; *Bamasoonduree* v. *Grish Chunder Banerjee*, 4 W. R. C. R., 106.

[7] *Ante*, p. 266.

[8] *G. Chinniah* v. *Bauboo Saib*, 5 Mad. H. C. Rep. 435; *Madhab Chunder Chowdhry* v. *Bukhtawaree*, 12 W. R. C. R., 102.

[9] *Amichand Talakchand* v. *Collector of Sholapur*, I. L. R., 13 Bom., 234.

The law does not recognize any act of a minor who has not a next friend or guardian for the suit before the Court,[1] and the Court should not take any proceedings at the instance of the minor himself.

Removal of next friend.

If the interest of the next friend of a minor is adverse to that of such minor, or if he is so connected with a defendant whose interest is adverse to that of the minor, as to make it unlikely that the minor's interest will be properly protected by him, or if he does not do his duty,[2] or, pending the suit, ceases to reside within British India, or for any other sufficient cause, application may be made on behalf of the minor,[3] or by a defendant, for his removal; and the Court (if satisfied of the sufficiency of the cause assigned) may order the next friend to be removed accordingly.[4]

Retirement of next friend.

Unless otherwise ordered by the Court, a next friend cannot retire at his own request without first procuring a fit person to be put in his place, and giving security for the costs already incurred.[5]

Application for appointment of new next friend.

The application for the appointment of a new next friend must be supported by affidavit showing the fitness of the person proposed, and also that he has no interest adverse to the minor.[6]

Stay of proceeding on death or removal of next friend.

On the death or removal of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.[7]

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[1] *Bamasoondaree* v. *Grish Chunder Banerjee*, 3 W. R., Act X, R. 138.

[2] As to the duty of a next friend see *post*, p. 280.

[3] By a next friend for the purposes of the application. Although an application under this section is not excepted from the operation of sec. 441 (see *post*, p. 279) it follows that the application must ordinarily be made by a next friend other than the next friend for the suit, as it is that next friend whom it is sought to remove.

[4] Act XIV of 1882, sec. 446. The removal of a guardian of a minor's person or estate would not *per se* operate to remove him from the office of next friend in a suit.

[5] Act XIV of 1882, sec. 447.

[6] *Ibid.* It should also appear that the proposed new next friend is willing to act, as no one can be appointed a next friend against his will; *Jadow Mulji* v. *Chhagan Raichand*, I. L. R., 5 Bom., 306; *Babaji* v. *Maruti*, I. L. R., 5 Bom., 310; 11 Bom. H. C. Rep., 182.

[7] Act XIV of 1882, sec. 448.

Application for appointment of new next friend.

If the pleader[1] of such minor omits, within a reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or the matter at issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit.[2]

Course to be followed by minor plaintiff on coming of age.

A minor plaintiff, or a minor not a party to a suit, on whose behalf an application is pending, on coming of age, must elect whether he will proceed with the suit or application.[3]

Where minor elects to proceed.

If he elects to proceed with the suit or application he shall apply for an order discharging the next friend, and for leave to proceed in his own name.[4]

Amended title.

The title of the suit or application shall, in such case, be corrected so as to read thenceforth thus :

"*A. B.*, late a minor, by *C. D.*, his next friend, but now of full age."[5]

When he elects to abandon it.

If he elects to abandon the suit or application, he shall, if a sole plaintiff, or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or respondent, or which may have been paid by his next friend.[6]

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[1] See *ante*, p. 266, note 4. This shows that the death or removal of the next friend does not avoid a warrant of attorney given by him. See *Krishna Vijaya* v. *Maradanayagam*, I. L. R., 15 Mad., 135.

[2] Act XIV of 1882, sec. 449. Sec. 441 excepts this application from those which must be made by the next friend acting in the suit.

[3] Act XIV of 1882, sec. 450. In the case of *Madhubchunder Chowdhry* v. *Buktessuree*, 12 W. R. C. R., 102, where the suit had been dismissed by the lower Appellate Court on the ground that the minor plaintiff was not properly represented, the High Court, after the minor had attained majority, permitted him to continue the suit, but on the terms that he should first pay all the costs of the defendant incurred up to that time. By adopting the suit the minor might make himself liable for costs previously incurred by his next friend ; see *Devkabai* v. *Jefferson*, I. L. R., 10 Bom., 248.

[4] Act XIV of 1882, sec. 451. An application under this section may be made at any time. An order on it will be given as of course, and the omission to make such an application will not necessarily create a bar to further proceedings ; *Doorgamohun Dass* v. *Tahir Ally*, I. L. R., 22 Calc., 270.

[5] Act XIV of 1882, sec. 451. This does not apply to proceedings in execution ; *Doorgamohun Dass* v. *Tahir Ally*, I. L. R., 22 Calc., 270.

[6] Act XIV of 1882, sec. 452.

Making and proving applications.

These applications may be made *ex parte;* and they must be supported by affidavit that the late minor has attained his full age.[1]

Where the late minor does not wish to continue the suit or application and does not consent to pay costs he can refrain from taking any steps. In that case the defendant can obtain the dismissal of the suit, but he cannot compel the plaintiff to pay any costs.[2] The next friend can be made to pay them if the suit is improper.

Minor co-plaintiff repudiating suit.

A minor co-plaintiff, on coming of age, and desiring to repudiate the suit, must apply to have his name struck out as co-plaintiff; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit. Notice of the application shall be served on the next friend as well as on the defendant;[3] and it must be proved by affidavit that the late minor has attained his full age.[4] The costs of all parties of such application and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs. If the late minor be a necessary party to the suit, the Court may direct him to be made a defendant.[5]

When suit unreasonable or improper.

If any minor on attaining majority can prove to the satisfaction of the Court that a suit instituted in his name by a next friend was unreasonable or improper, he may, if a sole plaintiff, apply to have the suit dismissed. Notice of the application shall be served on all the parties concerned; and the Court, on being satisfied of such unreasonableness or impropriety, may grant the application, and order the next friend to pay the costs of all parties in respect of the application, and of anything done in the suit.[6]

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[1] Act XIV of 1882, sec. 453. The minor's own affidavit alone would rarely be sufficient.

[2] See *Turner* v. *Turner*, 1 Stra., 708.

[3] The co-plaintiffs of the minor might be interested in the question. It would therefore generally be better to serve them also with notice of the application.

[4] See *ante*, note 1.

[5] Act XIV of 1882, sec. 454. An order under this section directing a next friend to pay costs is appealable; *ibid*, sec. 588 (22).

[6] Act XIV of 1882, sec. 455. An order under this section directing a next friend to pay costs is appealable; *ibid*, sec. 588 (22).

Next friend cannot continue suit after majority.

A next friend cannot, after the minor has attained majority, and has elected not to go on with a suit or application commenced on his behalf, insist on continuing such suit or application.[1] If he has incurred any costs he has a sufficient remedy for them against his late ward.[2]

On death.

Similarly, a next friend cannot continue a suit after the death of the minor.[3]

Change of attorney on coming of age.

According to the practice of the Bengal High Court a minor plaintiff or defendant on coming of age is not allowed to appear by another attorney, unless he has obtained an order from the Court.[4]

Removal of guardian for the suit.

If the guardian for the suit of a minor defendant does not do his duty,[5] or if other sufficient ground[6] be made to appear, the Court may remove him and may order him to pay such costs as may have been occasioned to any party by his breach of duty.[7]

He cannot retire except with the permission of the Court, and on the appointment of another guardian for the suit in his place.

Death of guardian for the suit.

If the guardian for the suit dies pending such suit or is removed by the Court, the Court shall appoint a new guardian in his place.[8]

Discharge of guardian for suit on minor attaining majority.

When a minor defendant attains his majority he should apply to the Court for the discharge of his guardian for

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[1] *Bistupriya Patnadyi* v. *Basudeb*, 6 B. L. R., 190; 13 Moo. I. A., 602; 15 W. R. P. C., 19.

[2] See *post*, chap. xxvi.

[3] *Hulodhur Roy Chowdhry* v. *Judoonath Mookerjee*, 14 W. R.C. R., 162.

[4] Belchambers' Rules and Orders, Rule 585. It has been held that the order for change will only be granted on payment of costs already incurred; Belchambers' Practice, p. 266. In England this rule applies to a minor co-plaintiff; *Swift* v. *Gracebrook*, 13 Sim., 185. As to a change of attorney by a next friend or guardian for the suit, see *post*, chap. xxvii.

[5] See *post*, p. 280.

[6] If an officer of the Court or a pleader or attorney be appointed guardian for the suit, and the plaintiff does not put him in funds to conduct the defence the Court may remove him under this section; see *Narayandas Ramdas* v. *Sahib Husen*, I. L. R., 12 Bom., 53.

[7] Act XIV of 1882, sec. 458. An order under this section directing the guardian for the suit to pay costs is appealable; *ibid*, sec. 588 (22). The removal of a guardian of the minor's person or estate does not *per se* operate to remove him from being guardian for a suit.

[8] Act XIV of 1882, sec. 459.

the suit. Such application should be supported by an affidavit shewing the date of the defendant's birth, and that he has attained his majority. Notice of the application should be given to the guardian for the suit, and to the plaintiff.

Enforcement of decree against minor representative of judgment-debtor.

When the enforcement of a decree is applied for against the heir or representative, being a minor, of a deceased party, a guardian for the suit of such minor shall be appointed by the Court, and the decree-holder shall serve on such guardian notice of such application.[1]

Service of summons on minor defendant.

Where there is a minor defendant he should be served with the summons in the way provided for the service upon adults.[2]

Service of notices and other process.

All notice of applications and other process in a suit where the plaintiff is a minor should be served on the next friend. They should be served upon the guardian for the suit in a suit where a minor is defendant.

Application to Civil Court by minor.

Every application on behalf of a minor must be made by his next friend, or his guardian for the suit, except where the application seeks the removal of the next friend or guardian,[3] or the appointment of a new next friend or guardian,[4] or is in any way against the next friend or guardian, or has to be made before the appointment of a guardian for the suit,[5] in which case the application should be made in the name of the minor by a next friend for the purpose of the application.[6]

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[1] Act XIV of 1882, sec. 460.

[2] *Ibid*, secs. 72 to 92. In a case (*Luckimonee* v. *Khettermoney*) cited in Broughton's Civil Procedure, 4th Edn., p. 92, Mr. Justice Norman required the summons to be served upon a minor defendant personally. Where a guardian for the suit has been properly appointed he can waive service of the summons, if it be in the interest of the minor so to do, but as pointed out above (p. 271) a guardian for the suit ought not ordinarily to be appointed until after service of summons. As to the service in suits brought against wards of the Court of Wards, see *post*, chap. xxxvi.

[3] See *ante*, pp. 276, 278.

[4] Act XIV of 1882, sec. 441. As to applications not in suits, see *post*, p. 287.

[5] In *Jotendronath Mitter* v. *Rajkristo Mitter*, I. L. R., 16 Calc., 771, an application for the transfer of a case from a District Court to the High Court was allowed to be made by the next friend of a minor defendant, where no guardian for the suit had been appointed.

[6] *Cox* v. *Wright*, 9 Jur. N. S., 981.

No order can be made upon an application to which a minor is respondent, unless a guardian for the suit be appointed.

Written statement.

According to the Calcutta practice neither a minor defendant nor his guardian for the suit can be compelled to file a written statement, but the guardian may file one.[1] It is otherwise in Bombay.[2] When the minor comes of age before the hearing, the Court will allow him to file a further written statement.

Appearance in Bengal High Court.

Suits taken as defended.

In a suit brought on the Original Side of the Bengal High Court the guardian should enter appearance.[3] All suits against minors brought in that Court are taken as defended suits.[4]

Duty of guardian for suit and next friend.

It is the duty of a guardian for the suit, as well as of a next friend, to do all that in him lies to further the interests of the minor, and he should be at least as active in guarding and promoting the interests of the minor, as he would be expected to be if his own interests were involved.[5] He stands in a fiduciary relationship to the minor for whom he is acting, and will not be permitted to retain any advantage obtained by him personally from the litigation.[6] He may be liable to the minor for damages in case of negligence in the conduct of the suit.

Where the guardian for the suit after an examination of all the materials for the defence, which may be available, finds that he can do nothing positively for the minor's benefit, his best course is merely to see that the case

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[1] See Belchambers' Rules and Orders, Rule 244. As to admissions by guardian for the suit, see *post*, p. 281.

[2] *Per* Farran, J., in *Nathmull Narsingdas* v. *Malharrao Holkar*, I. L. R., 19 Bom., 350.

[3] Belchambers' Rules and Orders, Rule 224.

[4] *Ibid*, Rule 221.

[5] Officers of the Court, and pleaders or attorneys, when appointed guardians for the suit, should be as active in the interests of the minor as other guardians. It is their duty to endeavour to ascertain what defence, if any, the minor has to the suit, and to support such defence by evidence. The fact that they are strangers to the minor does not in any way relieve them from their responsibilities. If they are not as active as possible, they should be removed.

[6] See *ante*, pp. 191, 192. He will not be permitted to bid at a sale of the minor's property by the Court; *Dodson* v. *Bishop*, Seton on Decrees, 5th Edn., p. 295.

against the minor is strictly proved and to submit the rights of the minor to the Court.[1]

A next friend or guardian for the suit must continue to act until a person be appointed in his place in accordance with law,[2] but if no funds be available, a guardian for the suit cannot be required to use his own for the minor.

Next friends and guardians for the suit can do anything in the ordinary conduct of the litigation which may be in the interest of their wards.[3] They can consent to any matter relating to the conduct of the suit,[4] provided that such consent be for the benefit of the minor.[5] Powers of next friend and guardian for the suit.

Unless it be for the benefit of the minor they cannot bind him by any admissions,[6] either in the pleadings or Admissions.

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[1] *Court of Wards* v. *Deo Nundun Singh*, 16 W. R. C. R., 142.

[2] Act XIV of 1882, secs. 446, 447, 458, *ante*, pp. 275, 278.

[3] See *Rhodes* v. *Swithenbank*, 22 Q. B. D., 577.

[4] They may consent to evidence being taken by affidavit; *Knatchbull* v. *Fowle*, 1 Ch. D., 604.

[5] *Rhodes* v. *Swithenbank*, 22 Q. B. D. at p. 579.

[6] Under English law a minor is not bound by any admissions made on his behalf in a suit to which he is a party. In *Abdool Hye* v. *Banee Parshad*, 21 W. R. C. R., 228, however, Phear, J., said: "We are very far from intending to say that the guardian of an infant defendant, if properly advised on all the circumstances surrounding the infant and his relations to the matter of the suit, cannot on his behalf admit facts essential to his adversary's case. It is, however, incumbent upon the Court, which is called upon to try an issue between a person of mature years and an infant, to take care that nothing of this kind is done unadvisedly. It should take nothing as admitted against an infant party to the suit, unless it is satisfied that the admission is made by some one competent to bind the infant, and fully informed upon the facts of the matter in litigation." See *Surujmookhi* v. *Bhagwati*, 10 C. L. R., 377. The admission of a next friend or guardian for the suit seems to be only admissible, under circumstances which would render the admissions of an attorney admissible; see Taylor on Evidence, 9th Edn., p. 742. A minor is apparently not bound by the statements of fact contained in a special case submitted for the opinion of the Court, unless such statements are substantiated by evidence. In England a minor is not bound by a special case unless leave has been given by the Court to set it down for hearing, and such leave cannot be given unless the Court be of opinion that it is proper that the question raised thereon shall be determined thereon, and be satisfied by affidavit or other sufficient evidence that the statements contained therein, so far as they affect the interest of the infant, are true; Order XXXIV, Rule 2; but there is no such provision in the Civil Procedure Code (Act XIV of 1882, secs. 527—531, *post*, p. 287.

Waiver of objections.

otherwise ; nor can they waive objections,[1] which could be taken on his behalf.

The minor would be bound by the admission of his predecessor in title in the suit. He would not be bound by any admissions made in the suit by himself, but statements made by him as to matters relevant to the enquiry may be used against him in suits brought during, or after the expiration of his minority, although their evidentiary value would be more or less diminished by the fact of his minority.[2]

Discovery against minor.

Neither the minor nor his next friend or guardian for the suit can be compelled to answer interrogatories.[3] It has been held in Calcutta[4] that they cannot, and in Bombay[5] that they can, be compelled to give discovery of documents by affidavit. They can be compelled to give evidence,[6] and there does not seem to be any reason why the Court should not be able to enforce the production of documents proved to be in the possession of the minor or his next friend or guardian for the suit.[7]

Production of documents.

Compromise of suits.

The power of the next friend or guardian for the suit to bind a minor by a compromise[8] entered into by him on behalf of the minor depended entirely, before the passing of Act X of 1877,[9] upon whether such compromise was for

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[1] In *Sramirao* v. *Collector of Dharwar*, I. L. R., 17 Bom., 299, it was held that the guardian for the suit was not empowered to waive objections as to the capacity of the Judge, as in that case such waiver was not for the minor's benefit. This case followed *Rhodes* v. *Swithenbank*, 22 Q. B. D., 577, where it was held that the next friend cannot waive a right of appeal, as such waiver was not for the minor's benefit. In *Chengal Reddi* v. *Venkatta Reddi*, I. L R., 12 Mad., 483, a minor was held bound by the consent of his guardian that an issue should be determined under sec. 9 of the Oaths Act (X of 1873) by the oath of the plaintiff.

[2] The Evidence Act makes no distinction between admissions by adults and by minors (Act I of 1872, secs. 17 *et seq.*).

[3] See *Waghji Thackersey* v. *Khotao Ranji*, I. L. R., 10 Bom., 167 ; *Ingram* v. *Little*, 11 Q. B. D., 251.

[4] *Duncan* v. *Bhoyroprosad*, I. L. R., 22 Calc., 891. See *Curtis* v. *Mundy* [1892], 2 Q. B., 178.

[5] *Nathmull Nursingdas* v. *Malharrao Holkar*, I. L. R., 19 Bom., 350.

[6] As to the testimony of minors, see *ante*, pp. 43, 44.

[7] Act XIV of 1882, sec. 130.

[8] As to the compromise of claims, see *ante*, pp. 186, 187.

[9] The Code of Civil Procedure, for which Act XIV of 1882 has been substituted.

the benefit of the minor and was free from fraud[1] or mistake,[2] except that a suit on the Original Side of the High Court of Bengal could not be compromised without the leave of that Court.[3] Where, however, the compromise had been confirmed by a decree, or where a length of time had elapsed between the time when the minor attained majority and the date of the institution of the suit to set aside the compromise, the Court would not set aside such compromise without the clearest proof of fraud or collusion.[4]

The Code of Civil Procedure provides[5] that "no next friend or guardian for the suit shall, without the leave of the Court,[6] enter into any agreement or compromise[7] on behalf of a minor with reference to the suit in which he acts as next friend or guardian. Any such agreement entered into without the leave of the Court shall be voidable against all parties other than the minor." It can be set aside either in a suit brought for that purpose or by an application for review.[8]

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[1] *Dharmaji Vaman* v. *Gurao Shrinivas*, 10 Bom. H. C. Reps., 311; *Ramlall Thakursidas* v. *Lakhmi Chand Muniram*, 1 Bom. H. C. Reps., 2nd Edn., App. li; *Roushun Jahan* v. *Enaet Hossein*, W R., 1864, C. R., 83, and 5 W. R. C. R., 4; *Abdool Ali* v. *Mozuffer Hossein Chowdhry*, 16 W. R. P. C., 22; *Lekraj Roy* v. *Mahtab Chand*, 14 Moo. I. A. 393; 10 B. L. R., 35; 17 W. R. C. R., 117; *Gopeenath* v. *Ramjeewun Lall*, 15 Beng. S. D. A., 913. Fraud would include the withholding of knowledge which is in the possession of one side and not of the other; *Brooke* v. *Mostyn*, 2 DeG. J. & G., 416.

[2] See per Garth, C. J., in *Solomon* v. *Abdool Azeez*, I. L. R., 6 Calc., 688; 8 C. L. R., 169.

[3] Belchambers' Rules & Orders, Rule 596.

[4] *Lekraj Roy* v. *Mahtab Chand*, 14 Moo. I. A., 393; 10 B. L. R., 35; 17 W. R. C. R., 117.

[5] Act XIV of 1882, sec. 462.

[6] The leave of the Court should be expressed and is not to be inferred from the passing of a decree; *Sharat Chunder Ghosh* v. *Kartik Chunder Mitter*, I. L. R., 9 Calc., 810; 12 C. L R., 453; *Rajagopal Takkaya Naiker* v. *Muttupalem Chetti*, I. L. R., 3 Mad., 103; *Kalavati* v. *Chedilal*, I. L. R., 17 All., 531.

[7] This includes a compromise made after decree.

[8] Act XIV of 1882, sec. 623. *Karmali Rahimbhoy* v. *Rahimbhoy Habibbhoy*, I. L. R., 13 Bom., 137. It is suggested in *Solomon* v. *Abdool Azeez*, I. L. R., 6 Calc., 688; 8 C. L. R., 169, that an application for review cannot be granted if the compromise though tainted by fraud or mistake was for the benefit of the infant, but that in the case of a suit being brought to set aside the compromise the question of the benefit of the infant does not arise.

This provision renders any compromise made without the leave of the Court void against the minor, and voidable by him; although it does not prevent the minor from disputing a compromise, even though sanctioned by the Court, on the ground that such sanction was obtained by fraud or by concealment of material facts.[1]

Duty of Court sanctioning compromise.

Before sanctioning a compromise the Court must endeavour to obtain from the parties all possible information as to the rights of the minor, and the Court should not sanction the compromise unless it be quite clear that it is for the benefit of the minor. Where the facts have not been ascertained in the proceedings the Court should satisfy itself by evidence, and should use its best endeavours to test such evidence as may be produced.[2] It is moreover the duty of the parties to place all possible materials before the Court.[3]

Suits by and against wards of Courts of Wards.

The Courts of Wards have no special powers for the compromise of suits,[4] but a next friend or guardian for the

[1] *Solomon* v. *Abdool Azeez*, I. L. R., 6 Calc., 688; 8 C. L. R., 169. The question whether a decree against a minor is void on the ground that it has not been sanctioned by the Court is not a question relating to the execution of the decree; *Arunachellam* v. *Murugappa*, I. L. R., 12 Mad., 503.

[2] *Solomon* v. *Abdool Azeez*, I. L. R., 6 Calc., 688; 8 C. L R., 169; *Kalavati* v. *Chedi Lal*, I.L. R.,17 All., 531. In the latter case it was held that the leave of the Court must be obtained before the agreement is entered into. Where the compromise effects the minor's rights to immoveable property, the Court may require a guardian appointed by a Civil Court to obtain the consent of that Court to the compromise; *Sheonundun Singh* v. *Kahsa Kooer*, 6 N.-W.P. H. C. Rep., 179.

[3] *Solomon* v. *Abdool Azeez*, I. L. R., 6 Calc., 688; 8 C. L. R., 169.

[4] Act XIV of 1882, sec. 464, provided amongst other things that sec. 462 of that Act should not apply to wards of the Courts of Wards. That section has been now replaced by sec. 53E of Act VIII of 1890, which enacts that nothing in chap. xxxi of the Civil Procedure Code shall derogate from the provisions of any local law for the time being in force relating to suits by and against minors. As there is no provision in the Acts constituting the Courts of Wards as to the compromise of suits, it follows that a Court of Wards is on the same footing as any other guardian in requiring the sanction of the Court in which the suit has been brought. As to the powers of the Court of Wards to compromise claims, see *ante*, pp. 186, 187. A manager may subject to the control of the Collector compromise suits or other proceedings in Revenue Courts in the North-Western Provinces, see Act VIII of 1879, sec. 24.

suit in a suit by or against a ward of the Courts of Wards of the North-West Provinces cannot compromise a suit without reference to that Court.[1]

Sale of property in partition suits.

In a suit for partition a request for sale may be made, or an undertaking, or application for leave to buy, may be given or made on behalf of a minor by his next friend, or guardian for the suit, but the Court is not bound to comply with such request, undertaking, or application, unless it is of opinion that the sale or purchase will be for the benefit of the minor.[2]

Receipt by next friend or guardian for the suit of property under decree for minor.

A next friend or guardian for the suit may not, without the leave of the Court, receive any money or other moveable property on behalf of a minor, either—

(*a*) by way of compromise before decree or order, or

(*b*) under a decree or order in favour of the minor.

Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other moveable property, the Court must, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.[3]

Princes and Chiefs.

Nothing in the chapter[4] of the Civil Procedure Code relating to suits by and against minors applies to a Sovereign Prince or ruling Chief suing or being sued in the name of his State or being sued, by direction of the Governor-General in Council or a Local Government, in the name of an agent or in any other name.[5]

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[1] Act VIII of 1879, sec. 23, amending Act XIX of 1873, sec. 205. In the other Provinces also reference should be ordinarily made to the Court of Wards, or to the officer having the powers of that Court, before a compromise is effected.

[2] Act IV of 1893, sec. 5.

[3] Act VIII of 1890, sec. 53D. An order made under this section is not appealable as such, see *ante*, p. 268, note 1. As to the investment of money paid into Court, see *ante*, p. 262.

[4] Chap. xxxi, Act XIV of 1882, secs. 440 to 462.

[5] Act VIII of 1890, sec. 53E, amending Act XIV of 1882, sec. 464. See *Venkatrav Raje Ghorpade* v. *Madhavrav Ramchandra*, I. L. R., 11 Bom., 53.

Appeals.

The appointment of a guardian for the suit enures for any appeal from a decree or order in the suit and for the whole litigation.[1] The next friend who has acted in the suit can also act for the minor whether he be appellant or respondent in the appeal. Unless they be removed, the next friend and guardian for the suit are the only persons entitled to prefer an appeal on behalf of the minor.[2]

Where after the decree in the Court below a minor has, by the death of a party or otherwise, become a necessary party to an appeal he must, when added as a party, be represented by a next friend or guardian for the suit as the case may be. The rules as to the appointment of next friends and guardians for the suit in suits will in that case be applicable.[3]

Appeals to Her Majesty in Council.

In appeals to Her Majesty in Council a minor must be represented in all applications by the person who appears on the record as his next friend or guardian for the suit.[4]

Where pending an appeal to Her Majesty in Council it becomes necessary to substitute a minor heir in the place of a party, who is dead, the High Court should take evidence, or cause it to be taken, and transmit the same to the Privy Council with an expression of opinion as to whether the minor is the proper person to be placed upon the record. In that case and in every other case where a minor is a party to the appeal and there is no next friend or guardian upon the record, an application for the appointment of a next friend or guardian must be made,[5] and the High Court should transmit with the petition and evidence its opinion as to who should be permitted to represent the minor on the appeal. On the receipt of such evidence

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[1] *Jwala Dei* v. *Pirbhu*, I. L. R., 14 All., 35.

[2] *Chedi Pande* v. *Lachminarain*, N.-W. P. W. N., 1893, p. 161.

[3] Act XIV of 1882, sec. 582. In *Bhobotarini* v. *Sreeram Paul*, I. L. R., 9 Calc., 629, where the next friend was made respondent to an appeal it was held that the appeal must be dismissed.

[4] Rules of Bengal High Court, Appellate Side, Part II, chap. iv, Rule 22.

[5] See Bengal High Court Rules, Appellate Side, Part II, chap. iv, Rule 23.

and opinion, the Judicial Committee of the Privy Council will make the necessary order.[1]

Suit by or against adult described as minor.

There is a class of cases, which only indirectly forms a portion of the law of minors. Those cases are where a suit is brought on behalf of or against an adult, as though he were a minor. The proper course in these cases for the opposite party to pursue, is to apply to have the plaint taken off the file or amended. If he does not do so, the addition of a next friend or guardian may be taken as surplusage.[2] If the suit is brought or a decree is made without the knowledge of the alleged minor, it will not bind him; but if he appear at the hearing or acquiesce in the decree he will be bound.

Applications otherwise than in a suit.

The rules contained in the Civil Procedure Code for the procedure in cases of suits by or against minors are, so far as may be, applicable to all miscellaneous proceedings in a Court of Civil Jurisdiction other than suits and appeals.[3] Every application otherwise than in a suit must be made by a next friend for the purpose of the application, and no order can be made upon an application to which a minor is a respondent unless a guardian for the application be appointed to protect his interests.[4]

Proceedings under Land Acquisition Act.

Provided his interest be not adverse to his ward a guardian[5] is entitled to act for his ward in proceedings under the Land Acquisition Act.[6]

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[1] *Haidar Ali* v. *Tassaduk Rasul*, L. R., 15 I. A., 209; I. L. R., 16 Calc., 184.

[2] *Taqui Jan* v. *Obaidulla*, I. L. R., 21 Calc., 866; *Net Lall Sahoo* v. *Kareem Bux*, I. L. R., 23 Calc., 686. See *Shama Churn Ghose* v. *Taruknath Mukhopadhya*, 3 B. L. R., App., 115.

[3] Act XIV of 1882, sec. 647. These rules would apply also to proceedings to file and enforce an award under chap. xxxvii of the Civil Procedure Code and proceedings on agreement of parties under chap. xxxviii, *ante*, p. 281; see *Vasudev Vishnu* v. *Narayan Jagannath*, 9 Bom. H. C. Rep., 892.

[4] As to applications in suits, see *ante*, p. 279.

[5] *i.e.*, a guardian appointed by the Court, or a natural or testamentary guardian, or a manager appointed by a Court of Wards.

[6] Act I of 1894, sec. 3 (*g*). The guardian must zealously maintain the interests of his ward in these proceedings and cannot come to an arrangement, by which the rights of the ward are given up; *Luchmeswar Sing* v. *Chairman, Darbhanga Municipality*, I. L. R., 18 Calc., 99; L. R., 17 I. A., 90.

Procedure if interest of guardian adverse.

If it be shown to the satisfaction of the Collector or Court that the interest of the guardian is adverse to that of his ward, the minor may appear by a next friend, or in default of his appearance by a next friend, the Collector or Court, as the case may be, shall appoint a guardian for the case to act on his behalf in the conduct thereof.[1]

Applications of sections of Civil Procedure Code.

The provisions of secs. 440 to 464 of the Civil Procedure Code,[2] *mutatis mutandis*, apply in the case of a minor appearing by a next friend or guardian for the case in such proceedings.[3]

Receipt of compensation or money.

No guardian can receive the compensation-money payable to his ward, unless he would be competent to alienate the land and receive and give a good discharge for the purchase-money on a voluntary sale.[4]

Investment of compensation money.

Where there is no person competent to alienate the land, the Court can order it to be invested in (*a*) the purchase of other lands to be held under the like title and conditions of ownership as the land for which the compensation-money is deposited, was held, or (*b*) if such purchase cannot be effected forthwith, then in such Government or other approved securities as the Court shall think fit. The money is to remain so invested until it be applied in the purchase of such other lands or in payment to the person becoming absolutely entitled.[5]

Payment of income.

The income is to be paid to the person entitled to the possession of the land.[6] This would ordinarily be the guardian of the minor.

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[1] Act I of 1894, sec. 3 (*g*), provisos (i) and (ii).

[2] *Ante*, pp. 263 to 285.

[3] Act I of 1894, sec. 3 (*g*), proviso (iii).

[4] Act I of 1894, sec. 3 (*g*), proviso (iv). This would apparently apply only to guardians having the leave of the Court to sell, or being empowered so to do by the document appointing them, but on the guardian making such a case of necessity as would have justified a voluntary sale, the Collector or Court could apparently allow him to receive the money.

[5] Act I of 1894, sec. 32 (1).

[6] *Ibid.*

The Court shall order the costs, charges and expenses of the investments and of orders for the payment of the income, and for the payment out of Court of the principal, and of all proceedings relating thereto, except such as may be occasioned by litigation between adverse claimants, to be paid by the Collector.[1] Costs, &c.

[1] Act I of 1894, sec. 32 (2).

CHAPTER XXVI.

COSTS OF SUITS BY AND AGAINST MINORS.

Liability of next friend for costs.

THE next friend of a minor in a suit or other civil proceeding may be ordered to pay costs as if he were plaintiff.[1] In the cases where an adult plaintiff would be ordered to pay the costs of the suit, the next friend would ordinarily be ordered to pay the costs of the opposite party,[2] even although he be an officer of the Court.[3]

Payment by minor.

It is not right to require a minor plaintiff to pay costs personally, and except in cases which would justify a personal decree for money against a minor,[4] it would rarely be right to make a personal decree against him for costs, but in some cases the circumstances would justify an order that costs be paid out of the property of the minor[5] or be charged upon a portion of his estate.[6]

Costs in suits for divorce, &c.

No petition presented by a minor under the Indian Divorce Act can be filed until the next friend has undertaken in writing to be answerable for costs. Such undertaking must be filed in Court, and the next friend is

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[1] Act XIV of 1882, secs. 440, 455, and 647.

[2] *Omrao Singh* v. *Prem Narain Singh*, 24 W. R. C. R., 264. He would not be liable unless an order to that effect be made against him; *Brijessuree* v. *Kishore Doss*, 25 W. R. C. R., 316.

[3] *Stephen* v. *Hume*, Morton, 281.

[4] *Ante*, p. 46.

[5] See Act XIV of 1882, sec. 222. As the question of payment of costs is a matter within the discretion of the Court, it is not possible to lay down any rules as to what cases would justify an order that payment of the costs of his opponent should be made out of a minor's estate. Generally such an order would be made in a case where the minor defendant if an adult would have been ordered to pay the costs of the plaintiff, *post*, p. 293.

[6] As for instance his share of the costs of a partition.

thereupon liable in the same manner and to the same extent as if he were a plaintiff in an ordinary suit.[1]

Appointment of attorney.

A next friend or guardian for the suit can appoint an attorney or pleader to act for the minor.[2] The death or removal of the next friend or guardian for the suit does not, of itself, discharge the attorney, or pleader.[3]

Costs of attorney.

Unless he relieves himself from liability by special agreement[4] a next friend or guardian for the suit is liable in the first instance for the costs incurred by the attorney or pleader employed by him.[5]

Recovery of costs from estate.

If the suit or proceeding has been properly brought, and properly conducted, whether it has been successful or not, the next friend can recover from the estate of the minor the costs which he has been compelled to pay to a defendant,[6] and also such costs, charges, and expenses as have been properly incurred in conducting the suit on behalf of the minor.[7] Similarly a guardian for the suit is,

[1] Act IV of 1869, sec. 49, *ante*, p. 265.

[2] A next friend is not allowed, as of course to change from one attorney to another; see Belchambers' Practice, p. 263; and *Brown* v. *Brown*, 11 Beav., 562. Except in the case where the change is likely to injure the interests of the minor, and therefore the Court might well decline to make any order, it is submitted that there is no reason why a next friend should be in this respect in a position different from that of an ordinary suitor. As no order of the Court is necessary in the case of a change of pleader, there seems to be nothing to prevent a next friend changing his pleader whenever he likes. The interests of a minor would suffer, if a next friend was compelled to employ an attorney of whom he disapproved.

[3] See *Krishna Vijaya Puchaya Naicker* v. *Marudanayagam Pillai*, I. L. R., 15 Mad., 135; *ante*, p. 276.

[4] *Radhanath Bose* v. *Suttoprosono Ghose*, 2 Ind. Jur. N. S., 269.

[5] The attorney cannot sue the minor or his representatives because the contract is made by the next friend; see *Radhanath Bose* v. *Suttoprosono Ghose*, 2 Ind. Jur. N. S., 269; *Joynarain Bose* v. *Mohesh Chunder Moonshee*, 14 Ben. S. D. A., 1215; *Branson* v. *Appasami*, I. L. R., 17 Mad., 257. In *Steed* v. *Preece*, L. R., 18 Eq., 196. Jessell, M.R., says: "An infant has no costs; the costs incurred on his behalf in a suit are the costs of his guardian or next friend." In *Watkins* v. *Dhunnoo*, I. L. R., 7 Calc., 140; 8 C. L. R., 433, a decree against the minor's estate was made at the suit of the attorney. There is no other authority for this.

[6] *Bistuprya Patmadyi* v. *Basudeb Dhall*, 6 B. L. R., 190; 13 Moo. I. A., 632; 15 W. R. P. C., 19; *Taner* v. *Ivie*, 2 Ves. Sen., 466; see Act IX of 1872, sec. 68, *ante*, p. 21.

[7] *Fearns* v. *Young*, 10 Ves., 184. As to the costs of next friends in suits by wards of the Courts of Wards, see *post*, chap. xxvi.

where his conduct is not improper, entitled to recover from the minor's estate his costs and expenses, and also such costs as he may have been compelled to pay to another party to the litigation.[1] Where the suit or proceeding is unnecessary or improper, or it has been improperly conducted, the next friend will not be permitted to recover his costs from the estate of the minor.[2]

As to security for the costs of an officer of the Court or an attorney or pleader who is appointed guardian for the suit, see *ante*, p. 273.

Lien of attorney.

An attorney acting on behalf of a minor has a lien for his costs on sums recovered in the suit or proceeding.[3]

Liability of guardian for the suit.

It is only in the case of breach of duty or improper conduct of the suit that a guardian for the suit can be made personally liable for the costs incurred by other parties.[4] He may however be liable, at any rate in the

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[1] See *Morgan* v. *Morgan*, 11 Jur. N. S., 233. He ought first to endeavour to obtain from other parties such costs as may have been ordered to be paid to him by them. It is not necessary that a suit should be brought by the next friend or guardian for the suit. The guardian of the minor's estate is justified in paying thereout such costs as have been properly incurred by a next friend or guardian for the suit. If the minor's property be in the hands of the Court, or as in the case of an administration or partition-suit there is property belonging to the minor with which the Court can deal, the Court can order the costs to be paid thereout; Act XIV of 1882, sec. 222. In *Gobind Chunder Gangooly* v. *Buddinath Biswas* which was a suit to set aside an adoption, Pontifex, J. (Dec. 19th, 1878) ordered the costs of a minor defendant to be paid out of his estate. The suit had been dismissed with costs, and the guardian for the suit was unable to recover his costs from the plaintiff, who had been admitted to sue as a pauper.

[2] *Pearce* v. *Pearce*, 9 Ves., 548; *Flight* v. *Bolland*, 4 Russ., 298; *Chowdhry Chuttursal Singa* v. *Government*, 3 W. R. C. R., 57; *Devkabai* v. *Jefferson*, I. L. R., 10 Bom., 248. It was held in *Whittaker* v. *Marlar*, 1 Cox, 285, that nothing short of a dishonest intention will be sufficient to render a next friend liable personally for the costs, and that no degree of mistake or misapprehension will be sufficient. But negligence in bringing an unnecessary or improper suit or impropriety in the conduct of it would be sufficient. This is recognised by sec. 455 of Act XIV of 1882, *ante*, p. 277.

[3] *Pritchard* v. *Roberts*, L. R., 17 Eq., 222; *Rudhanath Bose* v. *Nittoprosono Ghose*, 2 Ind. Jur. N. S., 269; see *Devkabai* v. *Jefferson*, I. L. R., 10 Bom., 248; Act IX of 1872, sec. 171.

[4] Sec. 458 of Act XIV of 1882 (*ante*, p. 278) does not apply only to cases where the guardian is removed, but applies to all cases where costs have

first instance, for the costs of unsuccessful applications made, or appeals preferred, by him.[1] Apart from any misconduct on his part, a guardian for the suit cannot be made liable for costs, or for anything which may be decreed against the minor in the suit.[2]

In a suit against a minor, if the Court considers that the guardian for the suit should be personally ordered to pay the costs, it should so state it in the decree or order. Where the guardian is simply declared liable for them as the defendant in the case, the liability must be taken to refer to him as the representative of the minor, and as representing his estate.[3]

Payment out of estate.

The Court can in a proper case order the costs of any of the parties to be paid out of the estate of a minor,[4] and will ordinarily do so where the minor defendant, if of age, would have been required to pay costs.

Guardians and Wards Act.

As to costs in proceedings under the Guardians and Wards Act, see Act VIII of 1890, sec. 49, *ante*, p. 118.

Suits against guardians.

As to the costs of suits against guardians for an account, see *ante*, pp. 192, 196.

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been occasioned by his breach of duty. It is only in a case of flagrant impropriety that a guardian should be made personally liable for costs. In *Goolam Hoosein* v. *Fatmabai*, I. L.R., 8 Bom., 391, where a guardian for the suit had been guilty of gross misconduct in putting executors to proof of a will which he wished to upset for his own private purposes, and which the evidence showed was to his knowledge duly executed by the testatrix in a sound state of mind, he was held liable for the costs of the suit. Where there has been no breach of duty there can be no order for costs; *Narasimha Rau* v. *Lakshmipati Rau*, I. L. R., 3 Mad., 263.

[1] He would in these cases be in a position similar to that of a next friend.

[2] *Morgan* v. *Morgan*, 11 Jur. N. S., 233; see, however, Macpherson on Infants, p. 397.

[3] *Komul Chunder Sen* v. *Surbessur Dass Goopto*, 21 W. R. C. R., 298; *Brojomohun Mojoomdar* v. *Roodronath Surmah Mojoomdar*, 15 W.R.C.R., 192.

[4] *Orford* v. *Churchill*, 3 V. & B., 59; *ante*, p. 290. As to the powers of the Court to sell and mortgage property belonging to a minor, see *ante*, chap. xxiv.

CHAPTER XXVII.

Decrees in Suits by and against Minors.

Duty of Court to watch interests of minor party to suit.

It is the duty of the Court in all the proceedings in a suit, and particularly at the trial, to watch and guard the interests of minor parties.[1]

Case to be proved against minor.

If the minor be a defendant the strictest proof should be required before a decree be made against him.[2]

Decree by consent.

The Court should not allow a decree by consent to be made against a minor without ascertaining that it is for the benefit of the minor that such a decree should be made.[3]

It is the duty of the Court, as far as possible, to prevent the minor being injured by the fraud laches or negligence of his next friend or guardian for the suit.[4]

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[1] This rule requiring the Court to protect the interests of a minor, even though he be properly represented, applies to all proceedings in the suit, and the Court should especially prevent an improper sale of a minor's property. In the case of *Abdool Kureem* v. *Jaun Ali*, 18 W. R. C. R., 56, Couch, C.J., said:—"It seems to us that the Courts ought to be extremely careful with regard to allowing the property of minors to be sold in execution of a decree. These are cases in which the proceedings ought to be carefully watched, and care ought to be taken that the property of minors is not disposed of except with proper precautions, and it is distinctly made to appear that the property of the minor is about to be sold."

[2] *Holden* v. *Hearn*, 1 Beav., 445

[3] *Ramchurn Raha* v. *Mungul Sircar*, 16 W. R. C. R., 232. A consent decrée is on the same footing as a compromise of a suit, as to which see *ante*, p. 284.

[4] As for instance where the next friend or guardian has allowed proceedings to drop. Where an appeal has been struck off in consequence of the neglect or inability of the guardian to prosecute it, the Appellate Court may restore the appeal; *Rajunder Narain Rae* v. *Bijai Govind Sing*, 2 Moo. I. A., 181; *Birjobuttee* v. *Pertaub Sing*, 8 Moo. I. A., 160; *Orphan Board* v. *Van Reenen*, 1 Knapp. P. C. Rep., 83. In *Keshopersad* v. *Hirdaynarain*, 6 C. L. R., 69, the Court acting under sec. 119 of Act VIII of 1859

If he be properly represented[1] by a next friend[2] or guardian for the suit,[3] and there be no fraud or collusion on the part of his next friend or guardian or of the opposite party,[4] and his next friend or guardian be not guilty of gross negligence,[5] a minor is as much bound by a decree made in a suit to which he is a party, whether it be made for his benefit or not,[6] as if he were of full age,[7] and it

Decrees properly made bind minors.

(Act XIV of 1882, sec. 108), set aside an *ex parte* decree, where a guardian for the suit had neglected to appear. The Court treated it as a neglect of duty, and held that the minors had been prevented "by sufficient cause from appearing."

[1] *Jungee Lall* v. *Sham Lall Misser*, 20 W. R. C. R., 120; *Khooshalo* v. *Subsookh*, 1 Agra H. C. Rep., 175; *Mrinamoyi* v. *Jogodishuri*, I. L. R., 5 Calc., 450.

[2] As to representation by a next friend, see *ante*, pp. 264 to 268.

[3] As to the appointment of a guardian for the suit, see *ante*, p. 271.

[4] In *Gregory* v. *Molesworth*, 3 Atk., 626, Lord Hardwicke said that it was right for Courts of Equity "to follow the rule of law, where it is held, an infant is as much bound by a judgment in his own action as if of full age; and this is general, unless gross laches or fraud and collusion appear in the *prochein amy*, then the infant might open it by a new bill." See also *Sheffield* v. *Buckinghamshire*, 1 Atk., 631. Fraudulent omission by a guardian to plead a defence avoids the decree; *Grish Chunder Mookerjee* v. *Miller*, 3 C. L. R., 17.

[5] *Sheo Churn Lal* v. *Ramnandan Dobey*, I. L. R., 22 Calc., 8; *Cursandas Natha* v. *Ladkavahu*, I. L. R., 19 Bom., 571. See *Kylash Chunder Sirkar* v. *Gooroo Churn Sirkar*, 3 W. R. C. R., 43; *Re Hoghton*, L. R., 18 Eq., 573 (576); Macpherson on Infants, p. 386. Mere negligence is not sufficient; *Daulat Singh* v. *Raghubir Sing*, N.-W. P. W. N. 1894, p. 141. It is not every kind of negligence nor any amount of negligence which would render proceedings otherwise regular and proper liable to be opened up. It must be such negligence as leads to the loss of a suit, which, if it had been conducted with due care, must have been successful. The mere omission to defend a suit is not a ground for setting aside a decree. As was said by the Judicial Committee of the Privy Council in *Lekraj Roy* v. *Mahtab Chund*, 14 Moo. I. A. at p. 399; 10 B. L. R. at p. 44; and 17 W. R. C. R., 117. "The interests of infants would seriously suffer if a notion were to prevail that guardians were bound for their own security to contest all claims against an infant's estate whether well or ill-founded." See also *Debi Dutt Sahoo* v. *Subodra*, I. L. R., 2 Calc., 283; 25 W. R. C. R., 449. See *ante*, p. 280, as to the duty of next friends and guardians for the suit.

[6] It was held in *Wall* v. *Bushby*, 1 B. C. C., 484, that a decree made by consent bound minor parties to the suit, although there had been no reference as to whether such decree would be for their benefit.

[7] *Eshan Chunder Safooi* v. *Nundamoni*, I. L. R., 10 Calc., 357; *Raghubar Dyal* v. *Bhikya Lall Misser*, I. L. R., 12 Calc., 69; *Cursandas Natha* v. *Ladkavahu*, I. L. R., 19 Bom., 571; *Modhoo Soodun Singh* v. *Prithee Bullub Paul*, 16 W. R. C. R., 231; *Makbul Ali* v. *Masnad*, 3 B. L. R., A. C. J., 54. See *Musleah* v. *Musleah*, 1 Boulnois, 58. As to the old practice, see *Nistareenee* v. *Ramnarain Mookerjee*, 3 Taylor & Bell, 31.

can be executed against him or his property, as the case may be, in accordance with law.

This rule applies not only to decrees made after a judicial adjudication on the questions in issue, but also to cases where an act or omission operates as a statutory bar to the institution of a new suit.[1]

Decrees by consent.

A decree by consent is on the same footing as other decrees and can only be set aside under the circumstances which would justify a minor in applying to set aside a decree made otherwise than by consent,[2] or under the circumstances which would justify an adult in applying to set aside a consent decree.

Personal decree against minor.

Except in a suit for damages for a wrongful act or in case of fraud, no personal decree for money, whether for costs or otherwise, would ordinarily be made against a minor in such a way as to be capable of execution against him personally during his minority.[3]

Execution of decree against minor.

There is no reason why a decree against a minor should not be executed against him personally after he has

[1] Such as the withdrawal of a suit without leave to bring a fresh suit, *Eshan Chunder Safooi* v. *Nundamoni*, I. L. R., 10 Calc., 357; the dismissal of a suit for default; *Venkatachalam* v. *Mahalakshmamma*, I. L. R., 10 Mad., 272; *Sheo Churn Lal* v. *Ramnandan Dobey*, I. L. R., 22 Calc., 8. The omission of a next friend to sue for a portion of the claim would operate as a bar under sec. 43 of Act XIV of 1882, but where there had been fraud or negligence it might be possible to set aside the former decree (see *ante*, p. 295); *Kylash Chunder Sircar* v. *Gooroo Churn Sircar*, 3 W. R. C. R., 43; *Grish Chunder Mookerjee* v. *Miller*, 3 C. L. R., 17.

[2] *Ramchurn Raha* v. *Mungul Sircar*, 16 W. R. C. R., 232. As to the making of consent decrees, see *ante*, p. 294. "It is necessary that one who rests his case on a decree made by consent against an infant should show that the consent was given by somebody having authority to bind the infant;" *Muhammad Mumtaz Ali Khan* v. *Sheoruttangir*, I. L. R., 23 Calc., 934; L. R., 23 I. A., 75.

[3] See *Turner* v. *Turner*, 1 Stra., 208. In *Bhushyam* v. *Jayaram*, I. L. R., 11 Mad., 303, the Court under Act XIV of 1882, sec. 622, set aside a personal decree against minors for the debt of their father. In *Radhanath Mookerjee* v. *Muthoormohun Roy* (Appeal from Original Side No. 48 of 1881) the Calcutta High Court on appeal made a similar order in the case of a family debt. The minor's estate may be made liable. Most suits against minors are against them as representing persons from whom they have obtained property; in that case the decree can rightly be made so as to be capable of execution against the property, which they have inherited or received.

attained majority,[1] and if a personal decree has been made against a minor there is nothing in the law to prevent its being executed against his person or property.[2]

Contempt of Court.

An order can be enforced against a minor by arrest and he may, like an adult, be punished for a contempt of the authority of a Court.[3]

Sale for arrears of Government Revenue.

As to the exemption of a minor's property from sale for arrears of Government Revenue, see *post*, Chaps. XXXIII, XXXIV, and XXXV.

Decrees how set aside.

There are generally two courses open to a minor who seeks to set aside a decree or other order on the ground of fraud or negligence. He may either apply by a way of review[4] to the Court which made the decree or order or he may bring a suit to set aside the decree or order.[5]

Ex parte decrees.

If the decree be an *ex parte* one, the procedure provided by the Civil Procedure Code for setting aside *ex parte* decrees[6] should be adopted, if complete relief can be obtained thereby.[7]

Review.

Where it is possible that by a reconsideration of the judgment, the rights of the minor, which were lost by the

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[1] *Sherafutoollah Chowdhry* v. *Abedoonissa*, 17 W. R. C. R., 374.

[2] *Collins* v. *Brook*, 5 H. & N., 708. If the decree be made against the minor, the Court cannot in execution-proceedings go behind it, *post*, p. 300. The minor should, if the decree has been erroneously made, endeavour to get it set aside.

[3] See *Thomas* v. *Gwynne*, 8 Beav., 312.

[4] Act XIV of 1882, secs. 623 to 630; *Kasmali Rahimbhoy* v. *Rahimbhoy Habibbhoy*, I. L. R., 13 Bom. at p. 142.

[5] See *Sheo Churn Lal* v. *Ramanandan Dobey*, I. L. R., 22 Calc., 8; *Eshan Chunder Sufooi* v. *Nundamoni*, I. L. R., 10 Calc., 357. In the latter case, Garth, C.J., added to these remedies a fresh suit for the same cause of action, setting up fraud as an answer to the statutory bar; see also *Daulat Sing* v. *Raghubir Singh* N.-W. P. W. N., 1894, p. 141. This would have no special advantage in point of form over a suit to set aside the decree. It might also in some cases be possible to obtain sufficient relief by way of appeal. It is not necessary that the minor should wait until he attains majority before taking proceedings to get rid of the consequences of his next friend or guardian's fraud or negligence. Proceedings can be taken on his behalf by another next friend.

[6] Act XIV of 1882, secs. 103, 108, and 157.

[7] *Raghubar Dyal Sahu* v. *Bhikya Lal Misser*, I. L. R., 12 Calc., 69. When a special remedy is available and is calculated to give complete relief, the fact that a suit is brought may be a matter to be considered in determining the question of payment of costs.

decree, can be restored, the proper course to pursue is for the minor to apply for a review.[1]

Suit.

Where, however, such course would not restore the minor to the position, in which he was placed before the decree, or where the prejudice to the minor's interests arises from transactions growing out of the decree and of such a nature that a mere review of judgment would prove ineffectual, his only remedy is to proceed by a suit against the persons in possession of his rights.[2]

When decree set aside, effect on subsequent proceedings.

Where the decree is set aside all proceedings under it will be liable to be set aside by the minor, and an execution-sale even to a *bonâ fide* purchaser will not, under these circumstances, bind the minor, at any rate, where such purchaser at or before the time of the sale receives notice that the minor is not bound by the decree.[3]

Where the purchaser has no such notice, he will not generally, if he has acted *bonâ fide*, be required to give up his purchase,[4] but this question depends entirely upon the circumstances of each particular case. It is for the Court to say in each case whether it will be in accordance with the principles of justice, equity, and good conscience that the sale ought to be set aside or not.[5] As a rule all that

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[1] As for instance where an available good ground of defence was not put forward at the hearing by the guardian; *Raghubar Dyal Sahu* v. *Bhikyal Misser*, I. L. R., 12 Calc., 69. See *Debi Dutt Sahoo* v. *Subodra*, I. L. R., 2 Calc., 283; 25 W. R. C. R., 449; *Karmali Rahimbhoy* v. *Rahimbhoy Habibbhoy*, I. L. R., 13 Bom. at p. 142. Act XIV of 1882, secs. 623 to 630; Act XV of 1877, sched. 2, arts. 162 and 173.

[2] *Debi Dutt Sahoo* v. *Subodra*, I. L. R., 2 Calc., 283; 25 W. R. C. R., 449. As to the limitation for such suits, see Act XV of 1877, sec. 7; sched. 2, arts. 44, 95, and 144, *post*, chap. xxviii.

[3] *Jungee Lall* v. *Shamlall Misser*, 20 W. R. C. R., 120; *Debi Dutt Sahoo* v. *Subodra*, I. L. R., 2 Calc., 283; 25 W. R. C. R., 449; *Grish Chunder Mookerjee* v. *Miller*, 3 C. L. R., 17.

[4] See *Khettermonee* v. *Kishenmohun Mitter*, Marsh., 313; 2 Hay, 196; *Natha Hari* v. *Jamni*, 8 Bom. H. C. Rep., A. C. J., 37; *Daji Himat* v. *Dhirajram*, I. L. R., 12 Bom., 18.

[5] *Abdool Hye* v. *Nawab Raj*, 9 W. R. C. R., 196; B. L. R., F.B. R., 911, see *Jan Ali* v. *Jan Ali Chowdhry*, 1 B. L. R. A. C., 56; 10 W. R. C. R., 154. As to the position of *bonâ fide* purchasers at execution-sales, see *Zain-ul Abdin Khan* v. *Muhammad Ashgar Ali Khan*, L. R., 15 I. A., 12; I. L. R., 10 All., 166; *Rewa Mahton* v. *Ramkishen Singh*, L. R., 13 I. A., 106, 110; I. L. R., 14 Calc., 18; *Mothura Mohun Ghose* v. *Akhoy Coomar Mitter*, I. L. R., 15 Calc., 557; *Pat* v. *Sharup Chand Mala*, I. L. R.,

a purchaser who is no party to a decree need look to, is the decree and the order for sale.[1]

Fraud.

Where the purchaser has been a party to any fraud, which has directly or indirectly brought about the sale, the Court will set aside the sale.[2]

Purchase by judgment-creditor.

Where the judgment-creditor is himself the purchaser, it would be unnecessary to prove that he has had notice of any of the proceedings, and an irregularity therein, which has been prejudicial to the minor, would justify the setting aside of the sale.[3]

Unless properly represented, decree or order does not bind minor.

Unless a minor is properly represented in a suit or other non-criminal judicial proceeding by a next friend or guardian for the suit or proceeding, as the case may be, neither the decree nor any order made on an application to which a minor is a necessary party,[4] will bind him or his estate,[5] but he can take advantage of them.[6]

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14 Calc., 376; *Debi Dutt Sahoo* v. *Subodra*, I. L. R., 2 Calc., 289; 25 W. R. C. R., 449; *Rangasami Chetti* v. *Periasami Mudali*, I. L. R., 17 Mad., 58.

[1] *Zain-ul Abdin Khan* v. *Muhammad Ashgar Ali Khan*, L. R., 15 I. A., 12; I. L. R., 10 All., 166. See *Abdool Kureem* v. *Jaun Ali*, 18 W. R. C. R., 56, and *Ishan Chunder Mitter* v. *Buksh Ali* Marsh., 614; W. R., F. B. R., 119.

[2] *Bunseedhur* v. *Bindeseree Dutt Singh*, 10 Moo. I. A., 454; 1 Ind. Jur. N. S., 165, *ante*, p. 153.

[3] See *Zain-ul Abdin Khan* v. *Muhammed Ashgar Ali Khan*, L. R., 15 I. A., 12; I. L. R., 10 All., 166. Where the irregularity has only been in the publishing or conducting a sale in execution the sale can only be set aside under sec. 312 of Act XIV of 1882.

[4] An *ex parte* application by the plaintiff for execution is not vitiated by the death of the guardian for the suit before such application; *Netlall Sahoo* v. *Kareem Bux*, I. L. R., 23 Calc., 686. It would be otherwise where the order could not be made except on notice to the minor.

[5] *Sreenath Koondoo* v. *Hureenarain Mudduck*, 7 W. R. C. R., 399; *Radha Kristo Surma* v. *Ram Chunder Doss*, 11 W. R. C. R., 300; *Bamasoonduree* v. *Grish Chunder Banerjee*, 3 W. R., Act X, R. 138; s. c. on review, 4 W. R. C. R., 106; *Nundcoomar Foutehdar* v. *Bunso Gopal Sahoy*, 23 W. R. C. R., 342; *Padmakar Vinayak* v. *Mahadev Krishna*, I. L. R., 10 Bom., 21; *Durgapersad* v. *Keshopersad Singh*, I. L. R., 8 Calc., 656; L. R., 9 I. A., 27; 11 C. L. R., 210. See also *Unnoda* v. *Stevenson*, 22 W. R. C. R., 291; *French* v. *Baranashee Banerjee*, 8 W. R. C. R., 29; *Kerakoose* v. *Serle*, 3 Moo. I. A., 329; *Sreenarain Mitter* v. *Kishensoondery*, 11 B. L. R., 191; s. c., *Nogendro Chander Mittro* v. *Kishensoondery*, 19 W. R. C. R., 139. No order for costs can be made against the minor's estate unless he be properly represented; *Amichand Talakchand* v. *Collector of Sholapur*, I. L. R., 13 Bom., 234.

[6] *Ante*, pp. 267, 269.

It has been held that the defect cannot be considered in execution-proceedings, as in such proceedings it must be assumed that the decree was properly made.[1]

Before the decree can be set aside, the minor must restore any benefit he may have received thereby.[2]

Effect of suit or proceeding in which minor is not a party.

A minor is not bound by a suit, appeal, or proceeding in which he is ignored,[3] but, if he has obtained any benefit thereby, he cannot get rid of its effect without restoring the other party to the position which he occupied before.[4]

Sale where interest of minor not sold.

A minor is not bound by a sale in execution, if, neither his rights and interest in the property, nor those of the person through whom he claims, are expressed to be sold.[5] It is necessary to see in each case what is actually sold.[6]

Conditions on which sale set aside.

Where the minor has benefited by the decree, or by the sale in execution, the purchaser has to that extent an equitable claim against the minor,[7] and where any portion of the proceeds of a sale in execution have been applied in any way for the benefit of the minor, the sale will not be set aside, except such sum, which has been so applied, be refunded by the minor.[8]

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[1] *Mahomed Nooroollah Khan* v. *Harcharan Rai*, 6 N.-W. P. H. C. R., 98; see *Subindra* v. *Budan*, I. L. R., 9 Mad., 80; *Arunachallam* v. *Murugappa*, I. L. R., 12 Mad., 503; see, however, cases *ante*, p. 299, note 5.

[2] *Vishnu Keshav* v. *Ramchandra Bhaskar*, I. L. R., 11 Bom., 130; *Hamir Singh* v. *Zakia*, I. L. R., 1 All., 57; *Daji Himat* v. *Dhirajram*, I. L. R., 12 Bom., 18.

[3] *Bhobotarini* v. *Sreeram Paul*, I.L. R., 9 Calc., 629; *Maruti Narayan* v. *Lilachund*, I. L. R., 6 Bom., 564; *Akoba Dada* v. *Sakharam*, I. L. R., 9 Bom., 429; *Jatha* v. *Venktapa*, I. L. R., 5 Bom., 14; *Subbanna* v. *Venkatakrishnan*, I. L. R., 11 Mad., 408; *Siva Bhagiam* v. *Palani Padiachi*, I. L. R., 4 Mad., 401.

[4] See cases, *post*, notes 7 and 8.

[5] *Abdool Kurreem* v. *Jaun Ali*, 18 W. R. C. R., 56; *Dyal Singh* v. *Ram Buddun Singh*, 17 W. R. C. R., 454; *Denobundo Pundit* v. *Mahomed Hossein*, 2 Hay, 549.

[6] *Bissessurlall Sahoo* v. *Luchmessur Sing*, L. R., 6 I. A., 233; *General Manager of the Raj Durbungah* v. *Ramaput Sing*, 14 Moo. I. A., 605; *Jairam Bujaba Shet* v. *Joma Kondia*, I. L. R., 11 Bom., 361; *Ishan Chunder Mitter* v. *Buksh Ali*, Marsh., 614; W. R. F. B. R., 119; *Dyal Sing* v. *Ram Buddun Singh*, 17 W. R. C. R., 454.

[7] *Dyal Singh* v. *Ram Buddun Singh*, 17 W. R. C. R., 454.

[8] *Vishnu Keshav* v. *Ramchandra Bhaskar*, I. L. R., 11 Bom., 130; *Jatha* v. *Venktapa*, I. L. R., 5 Bom., 14; *Jungeelall* v. *Shamlall Misser*, 20 W. R., C. R. 120; see *ante*, p. 215.

CHAPTER XXVIII.

Limitation of Suits by and against Minors.

Except in the case of certain special or local laws,[1] the periods of limitation provided for suits by adults do not apply to suits by minors ; but a further time within which to institute a suit is given to a minor after his attainment of the age of majority.

Effect of minority on the law of limitation of suits.

Sec. 7 of the Limitation Act[2] provides that:—If a person entitled to institute a suit or make an application[3] be, at the time from which the period of limitation is to be reckoned,[4] a minor[5] he may institute the suit or make the application within the same period,[6] after the disability has ceased,[7] as would otherwise have been allowed from

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[1] Act XV of 1877, sec. 6, *post*.

[2] Act XV of 1877.

[3] This includes an application for execution ; *Monmohun* v. *Ganga Soondery*, I. L. R., 9 Calc., 181 ; 11 C. L. R., 34, *post*, pp. 303, 304. As to the limitation under Act XIV of 1859, see *Jugmohun Mahto* v. *Luchmessur Singh*, I. L. R., 10 Calc., 748, differing from *Muthoora Dass* v. *Shumbhoo Dutt*, 20 W.R. C. R., 53, and cases there cited.

[4] See *Anundi Koonwar* v. *Thakoor Panday*, 1 Ind. Jur. N. S., 31 ; 4 W. R. M. A., 21 ; *Nusheeram Roy* v. *Shushee Bhooshun Roy*, 5 W. R. C. R., 169 ; *Taruck Chunder Sen* v. *Doorga Churn Sen*, 20 W. R. C. R., 2 ; *Ramcoomar Roy* v. *Shitul Pershad Roy*, 19 W. R. C. R., 425 ; *Siddhessur Dutt* v. *Shamchand Nundun*, 23 W. R. C. R., 285 ; *Vira Pillay* v. *Muruga Muttayan*, 2 Mad. H. C. Rep., 340 ; *Mahabut Ali* v. *Ali Mahmed Kulal*, 3 B. L. R., App., 80, in which it was held that a minor could not avail himself of this extension in respect of a cause of action which arose before the right to sue accrued to him, see Act XV of 1877, sec. 9, *post*. In *Ramphul Singh* v. *Degnarain Singh*, I. L. R., 8 Calc., 517 ; 10 C. L. R., 489, it was held that a suit by a son to set aside an alienation made by the father in a family governed by the Mitakshara law can be brought within three years from majority.

[5] *i.e.*, a minor according to the general law (*ante*, chap. 1) ; see *Hari Mahadaji* v. *Vasudev Moreshvar*, 2 Bom. H. C. Rep., 244, 2nd Edn., 325.

[6] Provided it does not exceed three years ; *post*, p. 302.

[7] The day of attaining majority will be excluded in the calculation :

the time from which by that Act the period begins to run in the case of an adult.[1]

Right of legal representative.

When his disability continues up to his death, his legal representative[2] may institute the suit, or make the application, within the same period after the death as would otherwise have been allowed from the time so prescribed.[3]

When representative under disability.

When the representative is, at the time of the death, himself under disability, time does not begin to run against him until after his disability has ceased.[4]

Suits for pre-emption.

Sec. 7 of Act XV of 1877 does not apply to suits to enforce rights of pre-emption, and it does not extend for more than three years from the cessation of the disability, or the death of the person affected thereby, the period within which any suit must be instituted or application made.[5]

Extension of period of limitation how limited.

Minor jointly interested with others.

It has been held that the benefits of sec. 7 of the Limitation Act do not extend to cases where the minor is jointly interested with other persons, who are not under disability ;[6] but, except in cases where a discharge can

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Act XV of 1877, sec. 12 ; *Jugmohun Makto* v. *Luchmessur Singh*, I. L. R., 10 Calc., 752.

[1] *In Venkataramayyar* v. *Kothandaramayyar*, I. L. R., 13 Mad., 135, it was held that where a debt was incurred in the lifetime of the plaintiff's father, after whose death there had been an acknowledgment of the debt, this section applied (see Act XV of 1877, sec. 19). If the acknowledgment had been made during the lifetime of the father, the section would not have applied. The same principle would apply to a part payment of principal or a payment of interest as such (sec. 20).

[2] This does not include a purchaser from the minor, *post*, p. 303. It would include a son subsequently adopted in the place of the deceased minor; *Prosonnanath Roy Chowdhry* v. *Afzolonnessa*, I. L. R., 4. Calc., 523 ; 3 C. L. R., 391.

[3] Act XV of 1877, sec. 7.

[4] *Ibid.*

[5] *Ibid.* In the following cases it was held that the fact of a plaintiff not suing within three years of his attaining majority does not, in cases where the law allows a general limitation of twelve years, bar his suit, if brought within twelve years of the time when the cause of action accrued:—*Guz Behary Singh* v. *Washun*, W. R. 1864, C.R., 302; *Bissumbhur Sircar* v. *Soorodhuny*, 3 W. R.C.R., 21; *Hurish Chunder Nag* v. *Abbas Ali*, 5 W. R. C. R., 204 ; *Luchmun Singh* v. *Kazim Ali Khan*, 5 W. R. C. R., 219 ; *Poorun Singh* v. *Kasheenath Singh*, 6 W. R. C. R., 20 ; *Radhamohun Gowee* v. *Mohesh Chunder Kotwal*, 7 W. R. C. R., 4 ; *Sree Pershad* v. *Treeumbuknath Deo*, 10 W. R. C. R., 44 ; *Bahur Ali* v. *Sookeea*, 13 W. R. C. R., 63.

[6] *Seshan* v. *Rajagopala*, I. L. R., 13 Mad., 236 ; *Vigneswara* v. *Bapayya*, I. L. R., 16 Mad., 436.

be given without the concurrence of the minor,[1] the rights of a minor are not altered by the circumstance that others are equally interested.[2]

Assignee of minor.

The benefits of sec. 7 are personal to the minor, and cannot be taken advantage of by his assignee either before or after his death.[3]

Appeals.

A minor appellant is confined to the same period as an adult,[4] but where the next friend of the minor has for his own advantage or by negligence allowed the time for appeal to expire, the Court may give the minor leave to appeal after time.[5]

Minority of one joint creditor.

When one of several joint creditors or claimants is a minor at the time from which the period of limitation is to be reckoned, and when a discharge[6] can be given without the concurrence of such person,[7] time will run against them all; but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others.[8]

Execution of decrees.

If a person entitled to execute a decree is a minor at the time when any one of the periods of three years in Art. 179 of the Second Schedule of the Limitation Act (XV

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[1] See Act XV of 1877, sec. 8.

[2] See *Anando Kishore Dass* v. *Anando Kishore Bose*, I. L. R., 14 Calc., 50; *Govindram* v. *Tatia*, I. L. R., 20 Bom., 383.

[3] See *Mahomed Arsad Chowdhry* v. *Yakoob Ally*, 15 B. L. R., 357; 24 W. R. C. R., 181; followed by a Full Bench of the Bengal High Court in *Rudra Kant Surma Sircar* v. *Nobokishore Surma Biswas*, I. L. R., 9 Calc., 663; 12 C. L. R., 269.

[4] See *Khoda Bux* v. *Budree Narain Singh*, I. L. R., 7 Calc., 137; 8 C. L. R., 306. As to appeals to Her Majesty in Council, see *Thurai Rajah* v. *Jainilab-deen Rowthan*, I. L. R., 18 Mad., 484.

[5] Act XV of 1877, sec. 5; *Cursandas Natha* v. *Ladkavahu*, I. L. R., 20 Bom., 104. See *ante*, p. 294, note 4.

[6] This applies only when the act of the adult owner is *per se* a valid discharge; *Govindram* v. *Tatia*, I. L. R., 20 Bom., 383; *Seshan* v. *Rajagopala*, I. L. R., 13 Mad., 236.

[7] As for instance in the case of a loan by a manager of a joint Hindu family; *Surjuprasad Singh* v. *Kwahish Ali*, I. L. R., 4 All., 512; or a debt to a partnership. Act XV of 1877, sec. 8, illus. (*a*).

[8] Act XV of 1877, sec. 8. See *Anando Kishore Das* v. *Anando Kishore Bose*, I. L. R., 14 Calc., 50; *Yeknath Ramchandra* v. *Waman Brahmadev*, I. L. R., 10 Bom., 241; *Govindram* v. *Tatia*, I. L. R., 20 Bom., 383; *Seshan* v. *Rajagopala*, I. L. R., 13 Mad., 236.

of 1877), commences,[1] the operation of the Act is suspended during the continuance of the minority,[2] and he is not barred by the provisions of sec. 230 of the Civil Procedure Code.[3]

Suit or application during minority not barred.

A next friend can, on behalf of a minor, institute a suit or make an application, for which the law gives to the minor an extended period of limitation after the attainment of his majority, at any time during the minority of the minor, even though the period of limitation which would have bound the minor, if he had been an adult, has expired, counting it from the time when the right to institute the suit or make the application accrued to the minor.[4]

Limitation not affected by fact that minor has competent guardian.

A minor does not lose the benefit of the provisions of the Limitation Act in his favour by the fact that during his minority his interests have been in the charge of a competent guardian, or under the Court of Wards.[5]

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[1] *i.e.* (1) date of decree or order:
(2) date of final decree or order:
(3) date of decision on review:
(4) date of applying in accordance with law to the proper Court for execution, or to take some step in aid of execution:
(5) date of issuing notice under sec. 248, Act XIV of 1882:
(6) date on which decree or order directs payment.

[2] *Lolitmohun Misser* v. *Janokynath Roy*, I. L. R., 20 Calc., 714; see *Anantharama Ayyan* v. *Karuppanan Kalingarayen*, I. L. R., 4 Mad., 119; *Jagjivan Amirchand* v. *Hasan Abraham*, I. L. R., 7 Bom., 179; *Anundi Koonwar* v. *Takoor Pandey*, 4 W. R. M. A., 21; 1 Ind. Jur. N. S., 31.

[3] Act XIV of 1882; *Moro Sadashiv* v. *Visaji Raghunath*, I. L. R., 16 Bom., 536; *Monmohun* v. *Gungasoondery*, I. L. R., 9 Calc., 181; 11 C. L. R., 34.

[4] *Phoolbas Koonwar* v. *Jogeshur Sahoy*, I. L. R., 1 Calc. at p. 243; L. R., 3 I. A. at p. 25; *Khoda Bux* v. *Budree Narain Singh*, I. L. R., 7 Calc., 137; 8 C. L. R., 306; *Monmohun Bukshee* v. *Gunga Soondery*, I. L. R., 9 Calc., 181; 11 C. L. R., 34; approved of in *Lolit Mohun Misser* v. *Janokynath Roy*, I. L. R., 20 Calc., 714; *Baldeo Singh* v. *Kishan Lal*, I. L. R., 9 All., 411; *Ram Chunder Roy* v. *Umbica*, 7 W. R. C. R., 161; *Ram Ghose* v. *Greedhur Ghose*, 14 W. R. C. R., 429; *Sufurunnissa* v. *Noorul Hossein*, 17 W. R. C. R., 419; *Hurro Chunder Bose* v. *Cassi Nath Roy Chowdhry*, 16 Beng. S. D. A. Reps., 19; *Woola Gowhur* v. *Shah Rukh*, 6 W. R. C. R., 19; *Ram Autar* v. *Dhunee Ram*, 1 N.-W. P. H. C. Rep., 22; *Baroo Mull* v. *Chujoo Mull*, 4 N.-W. P. H. C. Rep., 125.

[5] *Anantharama Ayyan* v. *Karuppanan Kalingarayen*, I. L. R., 4 Mad., 119; *Moro Sadashiv* v. *Visaji Raghunath*, I. L. R., 16 Bom 536; *Monmohun* v. *Gunga Soondery*, I. L. R., 5 Calc., 181; 11 C. L. R., 34; *Gunga Pershad Nundee* v. *Surnomoyee*, 13 Beng. S. D. A. Reps., 108; *Mahipatrav Chandrarav* v. *Nensuk Anandrav Shet Marvadi*, 4 Bom. H. C. Reps., A. C. J., 199.

When once time has begun to run, no subsequent disability, or inability to sue, stops it.[1] Continuous running of time.

Where a guardian has by negligence allowed his ward's right of suit to be barred by limitation, the ward cannot, after attaining majority, bring the suit, but must suffer by the *laches* of his guardian.[2] Should the omission to sue be the result of a fraudulent arrangement between the guardian and the person against whom the claim should have been made, it would be otherwise.[3] Loss of right by negligence of guardian. Fraud.

Sec. 7 of the Limitation Act 1877 [4] has no operation upon periods of limitation prescribed only by any special or local laws.[5] Special laws of limitation.

The Bengal Tenancy Act expressly excludes the operation of sec. 7 of the Limitation Act from suits for which a special period of limitation is provided by the former Act.[6]

The law of limitation does not treat suits against minors as in any way different from suits against adults.[7] Suits against minors.

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[1] *i.e.*, when a cause of action arises in favour of an adult the minority of a person upon whom the cause of action devolves does not bar the suit; Act XV of 1877, sec. 9; see sec. 7, *ante*, p. 301, and see *Prosonna Nath Roy Chowdhry* v. *Afzolonnessa*, I. L. R., 4 Calc., 523; *Gobind Coomar Chowdhry* v. *Huro Chunder Chowdhry*, 7 W. R. C. R., 134.

[2] *Anundee Koonwar* v. *Takoor Pandey*, 4 W. R. M. A., 21; 1 Ind. Jur. N. S., 31.

[3] *Abdool Ali* v. *Mahomed Mozuffur Hossein*, 5 W. R. C. R., 173; on appeal 16 W. R. P. C., 22. Act XV of 1877, sec. 18 and 2nd Schedule, art. 95.

[4] *Ante*, p. 301.

[5] Act XV of 1877, sec. 6. The cases on this subject before the passing of Act XV of 1877 were:—*Mahomed Bahadur Khan* v. *Collector of Bareilly*, 13 B. L. R., 292; L. R., 1 I. A., 167; *Poulson* v. *Modhoosoodun Paul Chowdhry*, 2 W. R., Act X, R., 21; *Kapilnath Sahai Deo* v. *Government*, 13 B. L. R., 445; 22 W. R. C. R., 17; *Dinonath Pandey* v. *Ruykoonath Pandey*, 5 W. R., Act X, R., 41; *Phoolbas Koonwur* v. *Jogeshur Sahoy*, I. L. R., 1 Calc. at p. 242; L. R., 3 I. A. at p. 25; *Hurosoonduree Chowdhrain* v. *Anundnath Roy Chowdhry*, 3 W. R. C. R., 8. Under sec. 11 of Act XIV of 1859, the extension was not limited by any reference to the periods prescribed in the Act, and it was held to apply to the limitations contained in all other Acts, which were not Codes complete in themselves. In *Veeramma* v. *Abbiah*, I. L. R., 18 Mad., 99, the effect of sec. 7 of Act XV of 1877, upon the Registration Act (III of 1877) was considered.

[6] Act VIII of 1885, sec. 185.

[7] The period of limitation for suits against minors must be calculated back from the date of filing the plaint, and not from that of the appointment of a guardian for the suit; *Khem Karan* v. *Har Dyal* I. L. R., 4 All., 37.

Acknowledgments by guardian.

The question whether in the case of a minor defendant an acknowldgement on his behalf will extend the period of limitation[1] depends upon the authority of the person making the acknowledgment. The manager of a business in which the minor is a sharer would ordinarily have such authority,[2] but except, perhaps, where the acknowledgment is made for the benefit of the minor, as for instance to save him from a ruinous suit, or to obtain necessary time for the payment of money, a guardian would not ordinarily have power to bind a minor by an acknowledgment on his behalf.[3]

Part payments and payments of interest.

The effect of a payment of interest, or part payment of principal,[4] would also depend upon the authority of the person making such payment.

Promise by guardian.

A guardian has no power to revive a debt, already barred by limitation, by promising to pay it, on behalf of his ward.[5]

Acknowledgment by minor.

An acknowledgment by a minor himself would only be efficacious in the case of a contract which he could not avoid, such as a contract for necessaries.[6] It would have no effect on any other cause of action.

Easements.

An easement can be acquired under the Limitation Act[7] by or against a minor.[8]

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[1] See Act XV of 1877, sec. 19.

[2] *Bhasker Tatya Shet* v. *Vijalal Nathu*, I. L. R., 17 Bom., 512, following *Chinnaya* v. *Gurunatham*, I. L. R., 5 Mad., 169, which, in reversing, *Kumarasami Nadar* v. *Pala Nagappa Chetti*, I. L. R., 1 Mad., 385, held that the manager of a Hindu family has the same authority to acknowledge as to create debts on behalf of the family. He cannot, however, revive a time barred debt except as against himself; *Dinkar* v. *Appaji*, I. L. R., 20 Bom., 155; *Chinnaya* v. *Gurunatham*, I. L. R., 5 Mad., 169; *Sobhanadri Apu Rau* v. *Sriramulu*, I. L. R., 17 Mad., 221.

[3] See *Azuddin Hossain* v. *Lloyd*, 13 C. L. R., 112; *Wajibun* v. *Kadir Buksh*, I. L. R., 13 Calc., 292; *Rammal Singji* v. *Vadilal Vakhatchand*, I. L. R., 20 Bom., 61; contra, *Sobhanadri Appa Rau* v. *Sriramulu*, I. L. R., 17 Mad., 221.

[4] See Act XV of 1877, sec. 20.

[5] See *Suryanarayana* v. *Narendra Thatraz*, I. L. R., 19 Mad., 255; Act IX of 1872, sec. 25 (3); and cases *ante*, note 2.

[6] See *ante*, pp. 19 to 23. *Williams* v. *Smith*, 4 El. & Bl., 180; 24 L. J. Q. B., 62.

[7] Act XV of 1877, sec. 26.

[8] See *Arzan* v. *Rakhal Chunder Roy Chowdhry*, I. L. R., 10 Calc., 214 at p. 218. Easements arising from express or implied grants cannot be acquired against a minor. Grants of easements would stand upon the same footing as other transfers; see *ante*, p. 28.

A special limitation of three years from the ward's attaining majority is provided for the case of a suit to set aside a sale by a guardian.[1] Suit to set aside sale by guardian.

As to the limitation of suits against guardians, see *ante*, p. 196. Suits against guardians.

[1] Act XV of 1877 sch. II, art. 44, *Prosonna Nath Roy Chowdhry* v. *Afzolonnessa*, I. L. R., 4 Calc., 523. This only applies to private sales, not to execution-sales in suits against the ward. It does not apply to mortgages or leases, in the case of which the limitation is the same, see art. 91, read with sec. 7. As to suits to set aside partitions made by guardians, see *Chanvirapa* v. *Danava*, I. L. R., 19 Bom., 593; *Krishnabai* v. *Khangowda*, I. L. R., 18 Bom., 197.

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CHAPTER XXIX.

Proof of Minority when in Issue.

Burden of proof when minority in issue.

When the fact of the minority of a person (whether a party to the suit or not) is in issue in a suit, the burden of proving minority generally falls upon the person alleging it.[1] It has, however, been held[2] that in a suit by a ward against his guardian for the possession of his property, the plaintiff alleging that he has attained majority, it is for the plaintiff to prove when he arrived at that age; and in a probate suit where the testator was alleged to be a minor, it was held that it must be proved that he was of capacity to make a will.[3]

As to the burden of proof in criminal charges against minors, see *ante*, p. 46, note 5.

Evidence of minority.

The appearance of the alleged minor may be taken into consideration, but the decision with respect to the issue of minority would generally rest mainly upon positive evidence of the age.[4] Evidence that he has

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[1] *Khettermohun Ghose* v. *Ramessur Ghose*, W. R., 1864, C. R., 304; *Nil Monee Chowdhry* v. *Zuheerunissa*, 8 W. R. C. R., 371; *Chyet Narain Singh* v. *Bunwaree Singh*, 23 W. R. C. R., 395.

[2] *Joy Tara* v. *Roychunder Ghose*, 1 W. R. C. R., 136.

[3] An unreported case decided by the Bengal High Court on an appeal from the Original side.

[4] *Sheebsunkur Dass* v. *Ulickchunder Aych*, Beng. S. D. A., 1859, p. 889; *Gour Dass Roy* v. *Shurfoonissa*, Beng. S. D. A., 1852, p. 94; *Khettermohun Ghose* v. *Ramessur Ghose*, W. R., 1864, C. R., 304; *Kalee Holdar* v. *Sreeram Ghose*, W. R., 1864, C. R., 366; *Chyet Narain Singh* v. *Bunwaree Singh*, 23 W. R. C. R., 395. See *Moorlee Dhur* v. *Nathonee Mahtoon*, 25 W. R. C. R., 184. The Mahomedan law provides that when a boy or girl approaches the age of puberty, and they declare themselves adult, and their outward appearance indicates nothing to the contrary, their declaration must be credited, and thence they become subject to all the laws affecting adults; *Shumsoon Nissa* v. *Ashrufoon Nissa*,

on other occasions acted as an adult,[1] as, for instance, where he has executed deeds, which would only bind him if of full age,[2] would be of importance.

Inspection.

A Judge has no power to order the inspection of an alleged minor's person by a medical man.[3]

Order appointing guardian.

An order appointing a guardian is no evidence of minority ;[4] no more is a horoscope, even when the person making it is dead.[5] A horoscope may, however, be used for refreshing the memory of the person who made it, or saw it at or soon after the time it was made and knew it to be correct.[6]

Horoscope.

Statements by relatives.

Statements made by deceased relatives as to the date of birth of an alleged minor have been held to be admissible in evidence on this question.[7]

Entry in register.

An entry in a register of births kept in accordance with law[8] is some evidence that the birth took place before the date on which it was registered.[9]

Offences under Factories Acts.

Where an act or omission would, if a person were under seven or twelve years of age, be an offence punishable under the Indian Factories Acts ;[10] and such person is,

1 Morley's Dig., p. 303 ; 2 Sev., 299 ; Macnaghten's Precedents of Mahomedan Law, chap. vi, case 17 ; Hedaya, vol. iii ; Tagore Law Lectures 1873, pp. 474, 475 ; see *ante*, p. 4.

2 *Kalee Holdar* v. *Sreeram Ghose*, W. R., 1864, C. R., 366.

3 *Ramrutton* v. *Ahmed Hossein Khan*, S. D. A. N.-W. P., 22nd February 1853.

4 *Queen-Empress* v. *Gurucharan Dusad* (decided by the High Court of Bengal). In 1847 a Judge of the Madras Supreme Court ordered such an inspection ; *In re Mooniatta*, *Madras Native Herald* for 1847, p. 193 ; Norton's Leading Cases, vol. i, p. 114.

5 *Gunjra Kuar* v. *Ablakh Pande*, I. L. R., 18 All., 478 ; *Satischander Mukhopadhya* v. *Mohendro Lal Pathuk*, I. L. R., 17 Calc., 849. In *Bai Parsen* v. *Vrijbhukan Vrindavandas*, Bombay P. J., 1876, p. 134, a certificate of administration seems to have been treated as some evidence of minority, but not as conclusive evidence ; see *Nilmonee Chowdhry* v. *Zuheerunissa Khanum*, 8 W. R. C. R., 371.

6 *Satishchander Mukhopadhya* v. *Mohendro Lal Pathuk*, I. L. R., 17 Calc., 849, following *Ramnarain Kallia* v. *Monee*, I. L. R., 9 Calc., 613.

7 See Act I of 1872, sec. 159.

8 *Ramchandra Dutt* v. *Joyeswarnarain Deo*, I. L. R., 20 Calc., 758 ; *Dhanmull* v. *Ramchunder Ghose*, I. L. R., 24 Calc., 265 ; 1 Calc. W. N., 270 ; contra, *Bepinbehary Daw* v. *Sreedamchunder Dey*, I. L. R., 13 Calc., 42. See *Nilmonee Chowdhry* v. *Zuheerunissa Khanum*, 8 W. R. C. R., 371.

9 As to registration of births see *ante*, p. 134.

10 *Re Wintle*, L. R., 9 Eq., 373. See Act I of 1872, secs. 74 to 77.

10 Acts XV of 1881, and XI of 1891, *ante*, pp. 25, 26.

in the opinion of the Court, apparently under such age, it is on the accused to prove that such person is not under such age.

A declaration in writing by a certifying surgeon that he has personally examined a person employed in a factory, and believes him to be under or over the age set forth in such declaration, is for the purpose of the Indian Factories Acts, admissible as evidence of the age of that person.[1]

As to proof of age in questions, which arise as to the right of a master to the continuance of the service of his apprentice, see Act XIX of 1850, sec. 2, *ante*, p. 143.

[1] Act XV of 1881, sec. 16.

CHAPTER XXX.

COURTS OF WARDS.

Courts of Wards.

OUTSIDE the Presidency towns power has been given to the Revenue authorities in certain Provinces, under the name of Courts of Wards, to protect the persons and properties of minor proprietors of land.

There are separate Courts of Wards in Bengal,[1] Madras[2] and the North-West Provinces.[3] There are also Courts of Wards in the Punjab,[4] Oudh[5] and Ajmere.[6]

The Courts of Wards owe their existence solely to the Legislature, and have no powers except such as are given to them by legislative enactments.

Rights of Court of Wards supersede those of other guardians.

The rights and powers of natural and testamentary guardians are superseded by the minor, or his estate, being taken under the superintendence of a Court of Wards. A Court of Wards having jurisdiction can disregard the appointment of a guardian of the person, or property, of a minor by any Civil Court, other than a High Court, and, in spite of such appointment it can take upon itself the care of the minor's person and property in accordance with law.[7]

Ouster of jurisdiction of Civil Court.

The Civil Court cannot under the Guardians and Wards Act appoint a guardian of the property of a minor who is under the superintendence of a Court of Wards, or

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[1] *Post*, chaps. xxxi to xxxiii.

[2] *Post*, chap. xxxv.

[3] *Post*, chap. xxxiv.

[4] Act IV of 1872, secs. 34 to 38, and Act XII of 1878.

[5] Act XVII of 1876, secs. 161 to 177.

[6] Reg. II of 1877, secs. 101 to 105.

[7] Act VIII of 1890, secs. 3 and 41, *ante*, pp. 84, 150, 190. *Madhusudan Sing* v. *Collector of Midnapore*, B. L. R., F. B. R., 199; 3 W. R. C. R., 83.

appoint or declare a guardian of the person of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.[1]

The Curators Act.

The possession of the estate of a minor proprietor by a Court of Wards cannot be disturbed by any proceeding under the Curators Act.[2] A Court of Wards may apply for relief under that Act against wrongful possession of a property to which the minor is entitled to succeed.[3] In case a minor whose property is subject to a Court of Wards be the party on whose behalf an application is made under that Act, the Judge, if he determines to cite the party in possession, and also appoint a curator, shall invest the Court of Wards with the curatorship of the estate pending the suit without taking security. If the minor shall, upon the adjudication of the summary suit provided for in that Act, appear to be entitled to the property, possession shall be delivered to the Court of Wards.[4]

Relation to wards and duties.

Courts of Wards and the managers and guardians appointed by them stand in the same fiduciary relation to their wards as other guardians, and are bound to do all that lies in their power in furtherance of the interests of their wards.[5] They must make no profit beyond that allowed to them in accordance with the law, and in taking care of the property or person of a ward must look only to his interests.[6]

Conflict of duties.

Although a Revenue officer may have duties to perform besides those arising from his connection with a Court of Wards, he must be careful that the ward's interests are guarded, and that, when his action in pursuance of other duties may be such as to prejudice the ward or at any

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[1] Act VIII of 1890, sec. 19, *ante*, p. 96 ; see *ante*, chap. xi.

[2] XIX of 1841, sec. 16 ; see *ante*, pp. 33, 34.

[3] Sec. 2, *ante*, p. 33.

[4] Sec. 16.

[5] See Act IX (B.C.) of 1879, sec. 40 ; *Luchmeswar Singh* v. *Chairman, Darbhanga Municipality*, I. L. R., 18 Calc., 99 ; L. R., 17 I. A., 90.

[6] See Act VIII of 1890, sec. 20, *ante*, p. 128 ; Act IX (B.C.) of 1879, sec. 40, *post*, chap. xxxii ; Act XIX of 1873, sec. 202, *post*, chap. xxxiv.

rate to require such officer to consider the interests of Government or some other person as well as the interests of the ward, he should, as far as possible, provide that there be some one independent of him, to care for the interests of the ward.[1]

Like other guardians,[2] Courts of Wards, and the managers, and guardians appointed by them, are responsible, as trustees, for the property entrusted to their care.[3] Responsibility as trustees.

They are not liable to be sued in respect of acts done by them within their powers, and the Civil Courts cannot in any way interfere with the exercise of the powers entrusted by the Legislature to Courts of Wards.[4] Exempt from interference by Civil Courts.

The authority of a Court of Wards is limited. It cannot exercise any authority, except such as has been given to it by the Legislature, and it can exercise that authority only in the way prescribed. It has no power to undertake other duties, as for instance those of executor or administrator of a deceased person, and it cannot take upon itself the management of any estates other than those which the Legislature has subjected to its jurisdiction.[5] Authority of Court of Wards limited.

The powers of the Courts of Wards do not extend to property held by minors in trust for others.[6] They No power over trust property.

[1] See *Seshama* v. *Sankara*, I. L. R., 12 Mad., 1; *Bikromajeet M. O. Deb* v. *Court of Wards*, 21 W. R. C. R., 312.

[2] *Ante*, p., 128. See Act VIII of 1890, sec. 37, *ante*, p. 194.

[3] Although Courts of Wards are trustees for the ward, the Government does not constitute itself a trustee for the rightful owner by directing the Court of Wards to take charge of property under Mad. Reg. V of 1804; *Viziaramaraju* v. *Secretary of State*, I. L. R., 5 Mad., 91; on appeal I. L. R., 8 Mad., 525; L. R., 12 I. A., 120.

[4] *Collector of Beerbhoom* v. *Munkadinee*, W. R., 1864, C. R., 332; 1 W. R. M. A., 7; *Shurut Soonduree* v. *Collector of Mymensingh*, 7 W. R. C. R., 221. Act XIX of 1873, sec. 241 (*k*), *post*, chap. xxxiv.

[5] *Rowshun Jehan* v. *Collector of Purneah*, 14 W. R. C. R., 295. See Act IV (B. C.) of 1879, sec. 5, *post*, chap. xxxi. In dealing with a case under Beng. Reg. LII of 1803, the Judicial Committee said:—"The provisions of such a law should be strictly pursued in order to effect the disqualification of any particular person, and no one should lose her natural liberty of contracting debts unless the relation of ward and guardian between her and the Court of Wards be regularly and completely constituted." *Mohummud Zahoor Ali Khan* v. *Rutta Koer*, 11 Moo. I. A. at p. 477.

[6] See *Rajessuree* v. *Jogendro Nath Roy*, 23 W. R. C. R., 278; as to minor trustees, see *ante*, pp. 38, 39.

cannot interfere with any property granted for the support of, or otherwise belonging to, any mosque, temple, or other religious establishment.[1]

A Court of Wards has no greater power to deal with the property than the ward would have if *sui juris*. In cases where letters of administration or a succession certificate would otherwise be necessary, the possession by the Court of Wards does not obviate such necessity.[2]

Retention of property after majority.

Except there be a power given to it by the Legislature[3] a Court of Wards cannot retain charge after the ward has attained majority, or the jurisdiction of the Court has otherwise ceased, whether there has been a formal relinquishment or not.[4] There is nothing to prevent a late ward making a Court of Wards his agent, but in that case the provisions of the enactment which governs that Court would not apply.

Acts in excess of authority.

If Courts of Wards, or their subordinates, act against the law, exceed their powers, or assume powers not given to them by law, they may be treated as persons dealing with property without legal authority.[5] A colourable exercise of authority for an indirect purpose, and not with the object of benefiting the ward, can be contested as not being a real exercise of discretion.[6]

Liability of subordinates.

Managers, guardians, and other persons (including Collectors and other officers of Government) professing to act under the authority of a Court of Wards are liable to be sued either by the ward during his minority with a properly constituted next friend, or after the ward's estate has ceased to be under the superintendence of the Court by the ward, or the heir or successor to his estate,[7]

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[1] See Act XX of 1863, sec. 22.

[2] As for instance in the case of the sale of Government securities standing in the name of the ward's ancestor.

[3] See Act IX (B. C.) of 1879, secs. 11 and 13.

[4] *Noormahomed* v. *Koondun Singh*, 2 Sel. Rep., S. D. A. N.-W. P., 496.

[5] *Collector of Sarun* v. *Ramlal*, Beng. S. D. A., 1854, p. 247.

[6] *Luchmeswar Singh* v. *Chairman, Darbhanga Municipality*, I. L. R., 18 Calc., 99; L. R., 17 I. A., 90.

[7] *Kishennath Raee* v. *Ramlal Mookerjee*, Beng. S. D. A., 1847, p. 506; *Anundnath Raee* v. *Collector of*

for money received by them or on security bonds executed by them, or for damages in respect of any act or omission contrary to law or for any breach of their respective trusts.

Court of Wards not a Government office.

A Court of Wards is not a Government office, and therefore a Civil Court cannot send for its records except by summons.[1] Managers, guardians, and other persons employed in the management of the estate of a ward or in the care of his person, are not public officers or public servants or in the employ of Government,[2] but a Collector performing duties imposed upon him as such by the law applicable to Courts of Wards would enjoy such advantages as are given by law to public officers or officers of Government.[3]

Disabilities of wards.

In addition to any special disabilities, which the respective Acts relating to them may impose,[4] minor wards of the several Courts of Wards are subject to the same disabilities as other minors.

The Government Management of Private Estates Act.

Estates under the Courts of Wards and minor's estates placed under the guardianship of a Revenue officer of the Government by a Civil Court are subject to the provisions

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Rajshahye, Beng. S. D. A., 1850, p. 301; *Collector of Sarun* v. *Ramlal*, Beng. S. D. A., 1854, p. 247. See Act IV (B. C.) of 1870, sec. 82, repealed by Act IX (B.C.) of 1879; Act XIX of 1873, sec. 206 (*f*). There are also certain special remedies, see Act IX (B.C.) of 1879, sec. 46, *post*, chap. xxxii; Mad. Reg. V of 1804, secs. 11, 24, and 26, *post*, chap. xxxv.

[1] *Sobbee Jha* v. *Shosheenath Jha*, 15 W. R. C. R., 150.

[2] See *Collector of Bijnor* v. *Munuvar*, I. L. R., 3 All., 20; *Queen* v. *Arayi*, I. L. R., 7 Mad., 17; *Sheoraj Singh* v. *Collector of Moradabad*, 2 N.-W. P. H. C. Rep., 379. Under Act IV (B. C.) of 1870, sec. 42, the manager and all persons employed in the management of the estate of any ward were deemed to be officers in the pay of Government in respect of their employment and remuneration; but this provision was not reproduced in Act IX (B.C.) of 1879.

[3] In the *Collector of Bijnor* v. *Munuvar*, I. L. R., 3 All., 20, the Collector was held entitled to notice of suit under sec. 424 of Act X of 1877, which corresponds with Act XIV of 1882, sec. 424. A manager would apparently not be entitled to such notice.

[4] See Act IX (B.C.) of 1879, secs. 60, 61; Act IV of 1892, sec. 12, *post*, chap. xxxiii.

of the Government Management of Private Estates Act[1] which are as follows :—

Power to levy rate.

Section 3.—It shall be lawful for the local Government—

(1) To levy on all private estates under Government management a rate, not exceeding five per cent. on the gross income,[2] calculated as nearly as may be possible to cover—

(*a*) the cost of all Government establishments in so far as they may be employed in the supervision or management of such estates other than establishments specially entertained for the supervision or management of any particular estate or group of estates ; and

(*b*) all contingent expenditure incurred in consequence of such supervision or management.

(2) From time to time to vary such rate ; and

(3) To reduce or remit such rate in any special case or cases as may be equitable :

Provided that, in deciding the amount of the rate to be levied under this Act on any particular estate or group of estates, the local Government shall consider the expenditure incurred on special establishments for such estate or estates.

Power to levy special charges.

Section 4.—In cases where an officer of the Government is employed to give legal advice or to audit accounts on behalf of any estate, the local Government, if it considers the services rendered to be of a special nature, may in its discretion direct a special charge to be made against that estate on account of such services, irrespective of the rate leviable under the last foregoing section.

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[1] X of 1892, sec. 2 (3).

[2] "Gross income" includes all receipts of every kind in produce or cash except money borrowed, recoveries of principal, and the proceeds of sale of immoveable property or of moveable property, properly classed as capital, sec. 2 (2); immoveable property includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries, or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops or grass, sec. 2 (1).

Saving as to special expenditure.

Section 5.—Nothing in this Act shall apply to the cost of establishments specially entertained or to the expenditure of any description specially incurred in respect of any particular estate or estates.

Validation of levy of past rates.

Section 6.—All rates for general supervision or management levied by any local Government before the commencement of this Act[1] shall be deemed to have been levied under this Act.

Power to make rules.

Section 7.—The local Government may make any rules and issue any orders which may be necessary for carrying this Act into effect, and which are consistent therewith.

Exemption from jurisdiction of Courts.

Section 8.—Where any Government establishment is employed in such supervision as aforesaid the local Government shall be the sole judge of the cost attributable to such employment, and its decision thereon shall not be questioned in any Court of law or otherwise.

[1] 25th October 1892 ; see sec. 1 (3).

CHAPTER XXXI.

The Court of Wards in Bengal, Constitution and Powers.

In Bengal, the Court of Wards was originally established more for the purpose of ensuring the collection of the revenue than for that of protecting minor proprietors.[1] The provisions of the Decennial Settlement, which was subsequently made permanent by Bengal Regulation I of 1793, gave rise to the necessity for the management by Government of the estates of minors and other persons disqualified from managing their property. In order to meet this necessity, and also in consequence of the many instances which occurred of minors, females, and other disqualified landholders, being entire proprietors of lands paying revenue immediately to Government, being reduced to ruin by the misconduct of those entrusted with their affairs, as well as of the frequent instances of minors being brought up in ignorance and dissipation by persons intrusted with their care and education with a view to engross the management of their affairs when they might come of age,[2] the system of management of the estates of disqualified landowners by Government officials under the denomination of the Court of Wards was established.

The reason for its establishment.

This system was inaugurated on the 20th August 1790, when the Governor-General in Council constituted the Board of Revenue a Court of Wards with powers to superintend the conduct, and inspect the accounts of the managers of estates of landholders disqualified from having

The Board of Revenue constituted a Court of Wards.

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[1] Markby's Lectures on Indian Law, p. 65.

[2] See the Preamble to Ben. Reg. X of 1793.

the management of their own lands by the rules prescribed for the Decennial Settlement (that is to say, females, with the exception of those whom the Governor-General in Council might deem competent to the management of their own estates, minors, lunatics, and persons of notorious profligacy of character, who not being partners with others of a different description were or might be entire proprietors of lands paying revenue immediately to Government). The Court of Wards also received instructions to see that minors received an education suitable to their rank and circumstances in life, such as might qualify them for the future management of their own concerns.[1]

Ben. Reg. X of 1793.

For the guidance of the Board of Revenue as the Court of Wards certain rules were issued on the 15th of July 1791, and with modifications were subsequently re-enacted in Bengal Regulation X of 1793. The general scheme of that Regulation was, that the estate and properties belonging to disqualified persons were to be managed by a serberakar, or manager, while their persons and education were committed to a guardian. Large powers were entrusted to the manager and guardian, who were, however, subject to the immediate control of the Collector and to the general superintendence of the Court of Wards.

Extension of its provisions.

By Bengal Regulation LII of 1803, amended by sec. 29 of Bengal Regulation VIII of 1805, the rules for constituting, and for fixing the jurisdiction of, the Court of Wards, contained in Regulation X of 1793, were extended to the ceded and conquered provinces; and Bengal Regulation VI of 1822 extended Regulation LII of 1803, with the addition contained in sec. 29, Regulation VIII of 1805, to the province of Benares.

Ben. Reg. I of 1829.

By Bengal Regulation I of 1829 the Commissioners of Revenue and Circuit were entrusted, within the districts comprised in their respective divisions, with the powers and authority then vested in the Boards of Revenue and Courts of Wards, subject to the control and direction of a sudder

[1] Colebrooke's Digest of the Regulations, vol. III, pp. 298 & 299.

or head Board, to be ordinarily stationed in each Presidency, unless otherwise directed by the Governor-General in Council.[1] "From this time," says Sir William Markby,[2] "the administration of the law upon this subject seems to have fallen into some confusion. We very frequently find the Collector spoken of as acting 'in his capacity of Court of Wards;' and the Collector also appears to have exercised himself many of the functions which are conferred by the Regulation upon the manager or guardian. But for this concentration of power into the hands of the Collector, there does not appear to have been any authority in law."

Act XXVI of 1854.

The Collector was, by Act XXVI of 1854,[3] entrusted with the general superintendence and control of the education of male minors, whose property was under the Court of Wards.

Act IV (B. C.) of 1870.

In 1870 the law relating to the Court of Wards within the provinces subject to the control of the Lieutenant-Governor of Bengal, was consolidated and amended by Act IV of the Acts of the Bengal Council for that year.

By that Act the Commissioner of Revenue of each division was constituted a Court of Wards,[4] but his powers were to be exercised subject to the control and supervision of the Board of Revenue and of the Lieutenant-Governor.[5]

Court of Wards Act, 1879.

Bengal Act IV of 1870 was repealed by the Court of Wards Act of 1879,[6] which contains the present law on this subject. It extends[7] to all the territories under the administration of the Lieutenant-Governor of Bengal, including the scheduled districts of Bengal, as defined in the Scheduled Districts Act, 1874.[8]

Saving of jurisdiction of High Courts.

The Court of Wards Act does not affect the jurisdiction as respects infants of any High Court of Judicature.[9]

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[1] Sec. 4.

[2] Lectures on Indian Law, p. 67.

[3] Repealed so far as relates to the provinces under the control of the Lieutenant-Governor of Bengal by Act IV (B. C.) of 1870, sec. 86.

[4] Sec. 8.

[5] Sec. 85.

[6] Act IX (B. C.) of 1879, sec. 2.

[7] Sec. 1.

[8] Act XIV of 1874.

[9] Act IX (B.C.) of 1879, sec. 4. See *ante*, chap. xiv. This provision seems to be unnecessary as the jurisdiction

Constitution of Court of Wards.

By the Court of Wards Act 1879[1] the Board of Revenue is constituted the Court of Wards for the territories to which the Act extends, and is directed to deal with every person and every property of which it may take or retain charge under the Act, or which may be placed under its charge by order of a competent Court, in accordance with the provisions of the Act.[2]

Control of Lieutenant-Governor.

It is to be guided by such orders and instructions, as it may from time to time receive from the Lieutenant-Governor.[3]

Jurisdiction of Court over minor proprietors.

Whenever the sole proprietor of lands, which are borne on the revenue-roll of a Collector as liable for the payment of one and the same demand of land revenue,[4] or of a share in such lands, other than an undivided share held in coparcenary as the property of a Hindu joint family governed by the *Mitakshara* or *Mithila* law,[5] or all the joint proprietors of such lands or share are declared by

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of the High Court cannot be affected by an Act of the Bengal Legislative Council. There is nothing to prevent the Court of Wards from exercising its jurisdiction over a minor who may be resident or may possess property within the limits of the Ordinary Original Civil Jurisdiction of the High Court of Bengal, but the High Court would retain its power over the minor and such of its property as might be within the jurisdiction of the High Court, and could at any time exclude the Court of Wards from the charge thereof. In practice it would be unlikely that any inconvenience would arise from this dual jurisdiction, as in cases where the Court of Wards has taken charge of the minor's property or person, the High Court would, unless another course were very manifestly necessary in the interests of the minor, either decline to interfere, or appoint as a guardian such person as the Court of Wards may have appointed guardian or manager. Moreover, the Court of Wards would necessarily be reluctant to interfere with cases which could more appropriately be dealt with by the High Court. The present law goes further than Act IV (B. C.) of 1870, which did not in any way affect proprietors who were subject to the jurisdiction as respects infants of a High Court, see sec. 2.

[1] Act IX (B. C.) of 1879, sec. 5.

[2] See Act IX (B.C.) of 1879, sec. 10, *ante*, p. 94. Except in pursuance of a statutory power a Civil Court cannot empower or direct the Court of Wards to take charge of the person or property of a minor. A Civil Court can only appoint an individual as guardian, see *ante*, p. 101.

[3] Act IX (B. C.) of 1879, sec. 69.

[4] Definition of "estate" in Act IX (B.C.) of 1879, sec. 3. The mode of acquisition by the proprietor is immaterial; *Cf* Act IV (B. C.) of 1870 secs. 3 and 4.

[5] Act IV of 1892, sec. 2.

the Court of Wards[1] to be minors,[2] that Court can take charge of all the property of every such proprietor or joint proprietor within its jurisdiction,[3] and of the person of any such proprietor, or joint proprietor who is resident within its jurisdiction;[4] and also of the person and property of any minor[5] member of the family[6] of any such proprietor or joint proprietor, who has an immediate[7] or reversionary interest in the property of such proprietor or joint proprietor.[8]

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[1] Act IX (B. C.) of 1879, sec. 6. See sec. 27, *post*, pp. 324, 325. A formal declaration of the minority is necessary to give the Court jurisdiction. This declaration could be made under sec. 27, or it might be included in the declaration provided for by sec. 35, *post*, p. 327.

[2] *i.e.*, under the age of twenty-one years; Act IX (B. C.) of 1879, sec. 3, see *ante*, p. 11.

[3] *i.e.*, within the territories to which the Act applies (*ante*, p. 320). Although the possession of revenue-paying property is a condition precedent to the jurisdiction of the Court of Wards attaching, when once that jurisdiction has attached all the property of the ward (whether separate or joint) becomes subject to the control of the Court of Wards; *Dhunput Singh* v. *Shoobhudra Kumari*, I. L. R., 8 Calc., 620; s. c., *Dhunput Singh* v. *Court of Wards*, 11 C. L. R., 285.

[4] As to minors resident in Calcutta, see *ante*, p. 320, note 9.

[5] There is not, as in the cases of minor proprietors (*post*, p. 324) any procedure for the ascertainment and declaration of the minority of members of his family; the Court of Wards must in such cases ascertain as best it can whether the proposed ward be in fact a minor. The decision of the Court of Wards would not in this case bind a Civil Court, or be any evidence before a Civil Court on the question of minority; see *ante*, p. 309. Should it turn out on an enquiry in a suit that the person taken charge of is not a minor, or is otherwise not subject to the jurisdiction of the Court, then any act of the Court of Wards in respect of the person or property of such alleged minor would be without jurisdiction. A minor member of a ward's family thus taken charge of is a ward within the meaning of the Act (sec. 3), and would be subject to the same disabilities as the ward and would not attain majority until twenty-one.

[6] The word "family" is not defined. It would include not only the wife and children of the minor, but brothers and sisters or other near relations. A minor mother might also be included. In the case of a minor leaving two minor widows, the younger only having a reversionary interest, such younger widow can be brought under the jurisdiction of the Court; Board's Proceedings of 21st December 1889, Nos. 197-99, Collection 3, File 413 of 1889.

[7] The expression "an immediate interest" is not one having any technical meaning. Having regard to the purposes of the Act, it is apparently intended to include only a right to present enjoyment such as a charge upon the property, or a life interest in a portion of it, or a right of maintenance.

[8] Act IX (B. C.) of 1879, sec. 7.

Court when bound to give up charge.

Whenever the circumstances of any ward become such that the Court could not take charge of him, or of his property, if he were not under its charge already, the Court is bound to release him and his property from its charge.[1]

Discretion of Court as to taking charge.

The Court of Wards may[2] in its discretion in any case in which it is empowered by the Act to take charge of the person, and property of any disqualified proprietor,

(*a*) take charge of such property without taking charge of such person ;[3]

(*b*) refrain from taking charge of any such person or property ;

(*c*) at any time withdraw from such charge if taken ;[4]

(*d*) at any time resume such charge, after having withdrawn from it.

When charge not to be taken.

Where heavy litigation is pending, or is required, in the interests of the estate, and no funds are available for conducting it, Commissioners and Collectors must not allow the Court to take over property in ignorance of the real state of affairs.[5]

Procedure when one of joint proprietors ceases to be disqualified.

Whenever one or more of the joint proprietors, of whose properties the Court of Wards has taken charge, ceases to

[1] Act IX (B. C.) of 1879, sec. 8 ; as for instance when the ward attains his majority, or where the result of a suit has deprived him of the estate, which gave the Court of Wards jurisdiction, or in the case contemplated by sec. 11 (*post*, p. 324), where no order is made under that section. Where the right of the ward to the possession of his property is disputed by the Court of Wards, as for instance where contrary to his allegation the Court asserts that he is still a minor, the right to possession can only be determined by a suit for possession in a Civil Court. As to the procedure, when the ward's jurisdiction ceases, see Act IX (B.C.) of 1879, sec. 65, *post*, p. 361. The Court has no power to retain charge after majority ; *ante*, p. 314.

[2] Act IX (B. C.) of 1879, sec. 9.

[3] The Court could not take charge of a portion only of the minor's property. It must take charge of the whole or none. The Act does not permit the Court to take charge of the minor's person without taking charge of his property, and if it takes charge of his person, it must take upon itself the whole charge of his custody, maintenance, and education.

[4] The Court cannot withdraw from a portion of the charge it has taken, except that it may withdraw from the charge of the minor's person, while retaining the charge of his property. It cannot withdraw from the charge of his property, while retaining the charge of his person. As to the procedure on withdrawal, see Act IX (B. C.) of 1879, sec. 65, *post* p. 361.

[5] Rules of Court of Wards, sec. 1, rule 2.

be subject to the jurisdiction of such Court, the Court may retain charge of the persons and properties of the still disqualified proprietors during the continuance of their disqualification.[1]

In case any person entitled to any property jointly with any disqualified proprietor shall consent thereto, the Court of Wards may retain or resume the charge of the property of such proprietor or any part thereof, so long as the property of any such disqualified proprietor remains in charge of the Court.[2]

Withdrawal from charge.

The Court of Wards may at any time withdraw from such charge.[3]

The following procedure must[4] be followed, when the person and estate of a minor proprietor[5] are taken under the superintendence of the Court of Wards.

Collector to make enquiry and report as to disqualified proprietors.

Whenever any Collector has reason to believe that any person residing in his district, or being the proprietor of an estate borne on the revenue-roll of his district, should be declared or adjudged to be a minor, he shall make such enquiry[6] as he may deem necessary, and if satisfied that such person should be so declared or adjudged, shall make a report of the same to the Court; and the Court shall, on receipt of such report, make such

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[1] Act IX (B. C.) of 1879, sec. 11, as amended by Act IV of 1892, sec. 7.

[2] *Ibid.* It is not clear whether this consent can be withdrawn without the assent of the Court of Wards. Apparently it cannot.

[3] Act IX (B. C.) of 1879, sec. 12.

[4] *Ante*, p. 313.

[5] *Ante*, p. 321. The Collector need only take action in the cases of such proprietors, whose persons or properties ought in his opinion to be committed to the charge of the Court of Wards.

[6] In making any enquiry under the Act, the Collector may exercise any power conferred by the Code of Civil Procedure on a Civil Court for the trial of suits; Act IX (B. C.) of 1879, sec. 66. This would include not only the powers given to the Court at the hearing of a suit, but also all such powers as are ancillary to the trial and determination of the questions to be tried. It would also apparently include a power to determine how the costs are to be borne. The enquiry should include one as to the age and birthday of the proprietor. The Collector must record and report through the Commissioner for the Court's information, the evidence on which his conclusions are based; Court of Wards Rules, sec. VIII (*g*).

order consistent with this Act as may seem to it expedient.[1]

Report of arrears of revenue before charge is taken.

If any arrear of revenue be due from an estate of which it is proposed that the Court shall take charge, a report of the circumstance must be specially made through the Commissioner to the Board before the estate is brought under the Court; and if the estate be the sole property of a minor or two or more minors, having descended to them by the regular course of inheritance, or by virtue of the will of the deceased owner, the report must with reference to sec. 24 of the Act[2] state what portion of the arrear has accrued before, and what portion has accrued after, the date on which the minor or minors succeeded to the property.[3]

Power to enforce provisions of Act without report.

The Court or the local Government may put the provisions of the Act in force without any report from the Collector.[4]

Proceedings on death of a proprietor whose heirs are minors.

Whenever any Collector receives information that the sole proprietor of an estate which is borne on the revenue-roll of his district has died, or that the sole proprietor of any estate has died within his district, and such Collector has reason to believe that the heirs of such proprietor should be declared or adjudged to be minors he may take such steps and make such orders for the safety and preservation of the moveable property of such heirs and of all deeds, documents, or papers relating to the property of such heirs, as to him may seem fit.[5]

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[1] Act IX (B. C.) of 1879, sec. 27. The Court can refuse to take the ward or his property under its superintendence; *ante*, p. 323. Should it determine to accept the charge, it must make an order as provided for in Act IX (B. C.) of 1879, sec. 35, *post*, p. 327.

[2] *Post*, p. 358.

[3] Court of Wards Rules, sec. I, rule 12.

[4] Act IX (B. C.) of 1879, sec. 28.

[5] *Ibid*, sec. 29. Any person who refuses to comply with an order of a Collector under this section is liable, by order of that Collector (Court of Wards Rules, sec. II, rule 5) to a fine not exceeding five hundred rupees; Act IX (B. C.) of 1879, sec. 57. Such fine with the reasons or grounds thereof must be formally recorded by the Collector; *ibid*, sec. 64. A fine can only be inflicted after the Collector has given the person charged an opportunity of being heard and of adducing evidence in his defence. The fine is to be levied in accordance with the Criminal Procedure Code (Act X of 1882, secs. 386, 387 and 389); see Act V (B. C.) of 1867, sec. 4. An appeal lies to the Commissioner to whom the Collector passing the order is ordinarily subordinate; Court of Wards Rules, sec. II, rule 5. Employés of the Court when taking charge should secure the attendance of respectable

Such Collector may call upon any other Collector in whose jurisdiction any such moveable property, or any such deeds, documents, or papers may be, to take charge of the same, and thereupon such other Collector shall have the same powers with respect to such property, deeds, documents, and papers within his district as are conferred on the first-mentioned Collector.

Recovery of expenses.

If the property is not afterwards taken under the charge of the Court, the expenses incurred by the Collector are recoverable as arrears of revenue from the owner of such property or the person or persons whom the Collector shall find to be in possession of such property, and constitute a demand under Bengal Act VII of 1868, or any similar law for the time being in force.[1]

Production of minor proprietor, and order for his temporary custody.

The Collector may direct that any person who has the custody of a minor heir of any such deceased proprietor shall produce such minor before such Collector or before any other Collector on a day fixed, and the Collector before whom the minor is so produced may make such order for the temporary custody and protection of such minor as to him may seem fit.

If the minor is a female, she shall not be brought into the presence of the Collector, but the Collector may take such steps for her identification as he may think fit.[2]

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independent witnesses at the opening of any room or receptacle, supposed to contain deeds, documents, papers, accounts, money, jewellery, and other valuables, and the verification of the lists of such property ; Court of Wards' Rules, sec. VIII (*h*).

[1] Act IX (B. C.) of 1879, sec. 29. See Acts I (B. C.) of 1895 and I (B. C.) of 1897.

[2] Act IX (B. C.) of 1879, sec. 30. The Collector can only exercise the powers given to him by this section if the proprietor is in fact a minor, and he should refrain, if possible, from exercising them unless the minority be beyond question. Should the Collector make an order in respect of a person who is in fact an adult, such person might be able to recover damages against the person detaining him, see *ante*, pp. 314, 315. A person disobeying an order made by a Collector under this section is liable by order of the same Collector to a fine as in cases under sec. 29, *ante*, p. 325; see Act IX (B. C.) of 1879, secs. 57 and 64 and Court of Wards Rules, sec. II, rule 5.

The following is the procedure after the ascertainment of the minority of the proprietor :—

Order declaring estate under charge of Court.

Whenever the Court has determined to take the person or property of a minor proprietor under its charge, whether in accordance with an order of the Civil Court or otherwise, the Court shall make an order declaring the fact and directing that possession be taken of such person and property, or of such property, on behalf of the Court, and the Court shall be held to be in charge of such property from the time when possession shall have been so taken.[1]

Collector to take possession of moveable property.

As soon as conveniently may be after such order the Collector of every district within which any part of the ward's property may be situated, or some person authorized in writing by him in that behalf, shall take possession of all accounts, papers, and moveable property of the ward, and place under proper custody such portion thereof as he may think necessary.[2]

Breaking open receptacle.

Any such Collector, or some person authorized as aforesaid may, in case he has reason to believe that any such account, paper, or property is in any room, box, or receptacle within any house in the actual possession of the ward, break open the same for the purpose of searching for such account, paper, or property.[3]

Additional powers of Collector.

Any such Collector may also order all persons in the employ of the ward or all persons who were in the employ of the deceased proprietor from whom the ward has derived his property to attend before him, and may order any person to deliver up any accounts, papers, or moveable property belonging to the ward, or any accounts or

Accounts and property.

[1] Act IX (B. C.) of 1879, sec. 35. This order should generally declare the fact of minority if there be no such declaration in the order under sec. 27, *ante*, pp. 324, 325.

[2] Act IX (B. C.) of 1879, sec. 36. Any person who refuses to comply with an order of a Collector under this section is liable to fine, as in cases under sec. 29, *ante*, p. 325, note 5; see Act IX (B. C.) of 1879, secs. 57 and 64: Court of Wards Rules, sec. II, rule 5. In taking charge under this section, the attendance of independent witnesses should be obtained as in cases under sec. 29, *ante*, p. 325, note 5; Court of Wards Rules, sec. VIII (*h*).

[3] Act IX (B.C.) of 1879, sec. 36.

papers relating to the ward's property, which the Collector has reason to believe are in such person's possession, and may order all holders of tenures and under-tenures on such property to produce their titles to such tenures and under-tenures.[1]

Titles to tenures.

Custody of title-deeds, &c.

All title-deeds and other valuables belonging to an estate are to be taken charge of by the Collector and kept in the treasury unless otherwise ordered by the Commissioner.[2]

Report of estate brought under charge.

When an estate is brought under the charge of the Court of Wards the Collector shall, as soon as conveniently may be, submit to the Commissioner a report containing all information requisite to explain how he proposes to manage the immoveable and moveable property, to provide for the maintenance of the ward and his family and for their education, the establishments that should be entertained, the debts due to and by the property, and the measures suggested for their liquidation.[3] The report should be accompanied by a scheme showing the estimated available annual assets of the estate and the details of the proposed regular expenditure.[4] This report is to be forwarded by the Commissioner with his recommendations for the orders of the Court.[5]

Record of rights.

As soon as an estate comes under the Court of Wards, the Collector must submit proposals for a survey and preparation of a record of rights. The state of the rent-roll, that is, whether doubts exist as to the rents payable, whether there are disputes with the tenants, and whether the rents appear to be fair, should be noticed, and the funds available for the operations under the Bengal Tenancy Act, should also be reported on.[6]

Opening of separate account for share in undivided joint estate.

As soon as the Court takes charge of a share in an undivided joint estate, the Collector must at once take steps to open a

[1] Act IX (B. C.) of 1879, sec. 37. Any person who refuses to comply with an order of a Collector under this section is liable to fine, as in cases under sec. 29, *ante*, p. 325; see Act IX (B. C.) of 1879, secs. 57 and 64 and Court of Wards Rules, sec. II, rule 5.

[2] Court of Wards Rules, sec. V, rule 1.

[3] Court of Wards Rules, sec. III, rule 1. Generally the report may be submitted complete in all respects except as to the liabilities and financial position of the estate, which it takes some time to ascertain; *ibid* rule 2.

[4] *Ibid*, rule 3. As to the arrangment of the scheme and the form of the statements of the financial position and prospects of the property, see Court of Wards Rules, sec. III, rules 4 and 5.

[5] Court of Wards Rules, sec. III, rule 1.

[6] Court of Wards Rules, sec. VIII, (c), rule 3; Circular Order No. 3 of February 1896. Act VIII of 1885, chap. x.

separate account for such share, in accordance with sec. 10 or 11 of Act XI of 1859 or sec. 70 of Act VII (B. C.) of 1876.[1]

Procedure when succession to property disputed.

Whenever, on the death of any ward, the succession to his property or any part thereof is in dispute, the Court of Wards may either direct that such property or part thereof be made over to any person claiming such property, or may retain charge of the same until the right to possession of the claimant has been determined under Bengal Act VII of 1876[2] or until the dispute has been determined by a competent Civil Court.[3]

General powers of Court of Wards.

Subject to the provisions of the Act the Court of Wards may, through its manager, do all such things requisite for the proper care and management of any property of which it may take or retain charge under the Act, or which may be placed under its charge by order of a competent Civil Court, as the proprietor of any such property,

[1] Court of Wards Rules, sec. I. rule 11.

[2] The Land Registration Act, 1876. Sec. 55 of that Act, as amended by Act V (B.C.) of 1878, contains the following:—

"If the applicant's possession of, succession to, or acquisition by transfer of, the extent of interest in respect of which he has applied to be registered, is disputed by or on behalf of any person making a conflicting claim in respect thereof, and if it is not proved to the satisfaction of the Collector that any person is in possession of the interest in dispute, the Collector shall determine summarily the right to possession of the same, and shall deliver possession accordingly and shall make the necessary entry in the registers; or if, in the opinion of the Collector, the dispute be one which can more properly be determined by a Civil Court, the Collector shall refer the matter in dispute to the Principal Civil Court of the district for determination as hereinafter provided."

[3] Act IX (B. C.) of 1879, sec. 13. The Court must, on the death of the ward, decide which course to adopt. It cannot await the determination of a question of possession by a Criminal Court acting under sec. 145 of the Code of Criminal Procedure (Act X of 1882) or of a Civil Court, acting under sec. 8 of the Specific Relief Act (I of 1877), or under its powers as a Court of Probate, unless the decision of such Civil Court completely determines the matters in dispute. It need not, however, await the decision of an Appellate Court, and it would not be entitled to await such decision unless execution be stayed in accordance with law. Under the old law (Act IV (B.C.) of 1870, secs. 80 and 81), the Court of Wards had express power in the case of disputed succession to sell the property in dispute by public auction, and to invest the proceeds in Government Promissory Notes. Now under Act IX (B.C.) of 1879, sec. 18 (*post*, p. 333), the Court has power to sell so long

if not disqualified, might do for its care and management,[1] and may, in respect of the person of any ward, do all such things as might be lawfully done by the legal guardian of such ward.[2]

Penalty for disobeying order of Court.

Any person who disobeys any lawful order of the Court is liable, on conviction before a Magistrate, to a fine not exceeding five hundred rupees, and if he is a manager or guardian appointed by the Court, to a fine not exceeding one thousand rupees.[3]

Exercise of powers conferred on Court through others.

The Court of Wards may exercise all or any powers conferred on it by the Act through the Commissioners of the divisions and the Collectors of the districts in which any part of the property of the ward may be situated, or through any other person whom it may appoint for such purpose.

Delegation of powers.

The Court of Wards may, with the sanction of the Lieutenant-Governor, from time to time delegate any of its powers to such Commissioners or Collectors or other persons as aforesaid, and may at any time with the like sanction revoke such delegation.[4]

Managing Collector.

When the estate or lands of a ward are situate within one district only, the Collector of that district is the Managing Collector,[5] both as regards the property and person of the ward.[6]

When the estate or lands of the ward are situate within more than one district, but in the same division, the Commissioner of

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as the property is under its charge, and this would apparently apply to the case of property remaining in charge of the Court of Wards in consequence of the succession being in dispute.

[1] This only applies to the care and management. Sales, mortgages, leases and farms can only be effected or given by the Court or the person acting for it (see sec. 15, *post*, note 4), and not by the manager; see sec. 18, *post*, p. 333.

[2] Act IX (B. C.) of 1879, sec. 14. As to the powers of a guardian of the person, see *ante*, chap. xvi.

[3] Act IX (B.C.) of 1879, sec. 59, see *ante*, p. 325, note 5.

[4] *Ibid*, sec. 15. As to appeals from orders of Collectors and Commissioners, see Act IX (B.C.) of 1879, sec. 67, *post*, p. 362. For instances where the Court has delegated its powers, see Court of Wards Rules, sec. I, rule 8.

[5] *i. e.*, the Collector through whom the Court will ordinarily exercise the powers conferred on it, or who will exercise the powers conferred on Collectors by the Act, or by the Court under the Act; Court of Wards Rules, sec. II, rule 1.

[6] *Ibid*, rule 2.

such division shall determine which of the Collectors shall be the managing Collector, both as regards the person and property of the ward, provided that with the approval of the Court he may appoint each Collector to be the managing Collector as regards the property and lands of the ward situate in his district.[1]

Managing Commissioner or Collector when estate situate in different divisions.

If the estate or lands of the ward are situated in different divisions, the Court will appoint one of the Commissioners of such divisions, and one of the Collectors in the division of that Commissioner to be the managing Commissioner and managing Collector,[2] both as regards the person and property of the ward; or if it sees fit, the Court may appoint each Commissioner and each Collector within whose jurisdiction any part of the property lies to be the managing Commissioner and managing Collector as far as regards that portion of the property.[3]

Establishments and expenses.

The Court may from time to time order such establishments to be entertained, and expenses to be incurred, as it shall consider requisite for the care and management of the persons and properties under its charge, for superintendence, for the audit of accounts and generally for all the purposes of the Act, and may order that such expenses, inclusive of all salaries, gratuities, and payments on account of the leave allowances of such establishments, be charged against any one or more properties for the purposes of which such establishments are, or have been, entertained or such expenses have been incurred.[4]

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[1] Court of Wards Rules, sec. II, rule 3 and sec. I, rule 8.

[2] *Ante*, p. 330, note 5. "Managing Commissioner" is similarly defined.

[3] Court of Wards Rules, sec. II, rule 4.

[4] Act IX (B. C.) of 1879, sec. 16, as amended by Act III (B. C.) of 1881, sec. 3. So far as regards the scale of remuneration and the number of officers and servants, all establishments require the sanction of the Court; Court of Wards Rules, sec. VIII (*a*), rule 1. Under Act IV (B.C.) of 1870, the remuneration of the guardian and the expense of an establishment of necessary servants had to be defrayed from the allowance fixed for the support of the ward, but now the Court can either require them to be paid out of such allowance or can deal with them under this section. As to the liability of an estate under the Court of Wards to contribute to the expense of Government establishments and the contingent expenditure incurred by Government, see Act X of 1892, sec. 9 of which repeals Act IX (B.C.) of 1879, sec. 17, as amended by Act III (B.C.) of 1881, sec. 3; *ante*, pp. 316, 317.

The following rules have been made by the Court of Wards on this subject : [1]—

Commissioners and Collectors may at their discretion entertain in anticipation of sanction such establishments as are necessary.

Appointments in sanctioned establishments.

Appointments to posts on duly sanctioned establishments shall ordinarily be made as follows—

(*a*) to posts of which the remuneration, including commission as estimated, is not above Rs. 10 a month, by managers ; above Rs. 10 and not above Rs 50, by Collectors ; above Rs. 50 and not above Rs. 200 by Commissioners ; above Rs. 200, by the Court of Wards with the previous sanction of Government :

(*b*) the Court, Commissioners, and Collectors will respectively appoint to all posts which are immediately attached to their respective offices, provided that the remuneration is not above the maximum to which they are authorised to appoint under clause (*a*) :

(*c*) the Court, Commissioners, and Collectors, respectively may specially reserve to themselves the appointment to any post to which a subordinate authority is generally authorised to appoint under clause (*a*).

Nominations for vacancies.

Every Collector in reporting to the Commissioner a vacancy in a post to which the Commissioner is authorised to appoint, and every Commissioner in reporting to the Court a vacancy in a post to which he is not authorised to appoint, shall ordinarily submit the names of one or more persons whom he considers qualified to fill the post with the grounds of his opinion. Such nominations will be duly considered with the claims of other candidates.

Appointment by manager.

Commissioners and Collectors respectively may at their discretion, and by a general order authorise the manager, when the latter is an officer drawing a salary of above Rs. 200 a month, and has been appointed by the Court, to appoint to any post on an establishment under his own immediate control, to which the Commissioner and the Collector respectively are authorised to appoint.[2]

Penalties for misconduct.

Every officer, other than a manager whose remuneration is more than Rs. 200 a month, is liable[3] in case of misconduct (*a*) to a

[1] Court of Wards Rules, sec. I, rule 8 (*b*) and sec. VIII (*a*), rules 2 and 3. When the officer is under Government and pays a portion of his salary to Government towards his pension and leave allowances, the amounts here given will represent his gross and not his net salary.

[2] Court of Wards Rules, sec. I, rule 8 (*c*).

[3] Court of Wards Rules, sec. VIII (*a*), rule 5.

fine[1] not exceeding one month's pay and allowances; (*b*) to suspension for a period not exceeding six months; (*c*) to dismissal.

Fine and suspension to the above extent may be inflicted by the Collector, or, in the case of an officer who is attached to the office of the Court or the Commissioner, by those authorities respectively; but no officer can be dismissed by the order of any authority inferior to that by which he was appointed to the post.[2]

Power of manager

Commissioners and Collectors may authorize managers, who have been appointed by the Court, and who draw above Rs. 200 a month to fine,[3] suspend or dismiss their employés.[4]

Security from manager's subordinates.

Collectors should see that sufficient security is taken from all subordinates of managers through whose hands money passes, and should be guided by the principles of the rules relating to the taking of security from public officers[5] in fixing the amount and character of the security.[6]

Power to manage property.

The Court may sanction the giving of leases or farms of the whole or part of any property under its charge, and may direct the mortgage or sale of any part of such property, and may direct the doing of all such other acts as it may judge to be most for the benefit of the property and the advantage of the ward.[7]

Execution of instrument of sale.

All conveyances relating to the sale of any property should be executed by the manager, they should contain a recital that the

[1] This would be only by way of deduction from pay, and even in that way it is doubtful whether it could be enforced in the case of a manager who does not, by remaining in the employment, consent to the imposition of the fine. The Act does not give the Court power to fine subordinates.

[2] Court of Wards Rules see VIII (*a*), rule 5.

[3] See *ante*, note 1.

[4] Court of Wards Rules, sec. I, rule 8 (*e*).

[5] Sec. XXV of the Revenue Officers' Manual, 1888.

[6] Court of Wards Rules, sec. VIII (*i*), rule 1.

[7] Act IX (B. C.) of 1879, sec. 18. This gives the largest possible powers, in addition to the powers of management given by sec. 14, *ante*, p. 330, but it is to be remembered that the Court can only consider the benefit of the property and the advantage of the ward. The interests of other individuals, of the public, or of Government, must not be considered. The exercise of the discretion here given to the Court of Wards cannot be questioned by a Civil Court except in the case of a colourable exercise of discretion, such as a pretended sale for a nominal consideration; see *Luchmeswar Singh* v. *Chairman, Darbhanga Municipality*, I. L. R., 18 Calc., 99; L. R., 17 I. A., 90. The Court of Wards would have no power to make a gift of any portion of the ward's property except under the conditions specified in sec. 48, Class II of the Act; *post*, p. 342. Under Act

sale is by direction of the Court, and in evidence of this the Collector should also sign. [1]

Farming of estates.

The giving of farms is to be discouraged, and will only be sanctioned in exceptional cases.[2] Direct management should be encouraged whenever possible.[3]

Powers of Commissioner.

Commissioners may [4]

(*a*) sanction the sale of moveable property and live-stock ; [5]

(*b*) sanction the settlements or re-settlements of ryots holdings either at higher or lower rates than were paid previously, and reductions of rent caused either by relinquishment of holdings, death and desertion of ryots, diluvion of lands, or in any other manner ;[6]

(*c*) sanction the remission, and writing off the accounts, of all arrears of rent or other debts, whether covered by decrees or not, which are barred by limitation or are otherwise irrecoverable ;

(*d*) sanction, after the budget has been passed by the Court, all other items of expenditure, other than those covered by the scheme of regular expenditure of the estate, which are included in the budget ;

IV (B. C.) of 1870, sec. 68, the powers of mortgage and sale could only be exercised for the purpose of liquidating debts, raising money for the costs of suits, or for the purchase of a share of any property, of which the ward might be a co-sharer, and for the default in payment of which the ward's share might, under the provisions of Act XI of 1859, be liable to sale.

[1] Court of Wards Rules, sec. VIII (*j*), rule 4. By rule 5 documents which create, &c., a title in immoveable property less than Rs 100 in value, registration of which under sec. 18 (*a*) of Act III of 1877 is optional, should be registered unless they are part of the records of a settlement of land revenue (sec. 90 (*a*) of the same Act).

[2] Court of Wards Rules, sec. VIII (*c*), rules 1 and 2. The only circumstances under which a proposal to give a usufructuary mortgage or the grant of a farm on payment of a bonus in connection with a ward's estate can be entertained are, when care has been taken to see that the interests of the ryots are completely protected, and that the mortgagee in possession, or farmer, is either bound down to collect only according to the jama-bundi settled by the Collector, or is debarred from enhancing rents save under conditions and circumstances to be determined beforehand. Under no circumstances should farms or *zar-i-peshgi* leases be given to enable the farmer or mortgagee to force against the wishes of the tenancy, the cultivation of indigo or any other crop through the influence he will obtain as farmer or mortgagee ; *ibid.*

[3] *Ibid.*

[4] Court of Ward's Rules, sec. I, rule 8.

[5] See also Court of Wards Rules, sec. VIII (*c*), rule 12.

[6] See also Court of Wards Rules sec. III, rule 11.

(*e*) sanction exceptional items of expenditure, whether they fall or not within any of the prescribed heads of the budget estimate, provided that the expenditure does not exceed Rs. 200 on any one item, and provided also that the expenditure can be met from general savings in the budget;

(*f*) allow manager's accounts to be audited by a Deputy Collector.

"Collectors may[1] accept tenders of Land Acquisition officers for lands of estates acquired under the Land Acquisition Act.[2] Land Acquisition.

If the Court of Wards thinks it expedient to direct the sale or mortgage of any part of an estate, of which the ward is the sole proprietor, it may order the Collector to partition off such part into a separate estate, and the demand of land revenue and of the cesses for which the original estate was liable shall be assessed upon and divided between the two separate estates so formed, respectively, in such manner as the Court of Wards with the sanction of the Lieutenant-Governor may direct.[3] When Court may order property to be formed into a separate estate.

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[1] Court of Wards Rules, sec. I, rule 8 (*kk*).

[2] I of 1894.

[3] Act IX (B. C.) of 1879, sec. 19. It is only for the purpose of sale or mortgage that the Court of Wards has power to order the Collector as a revenue officer to partition off property. It is competent to the Court of Wards in other cases to direct proceedings for a partition to be taken in a Revenue or in a Civil Court, but in these cases it would not be in a better position than that of any other suitor.

CHAPTER XXXII.

BENGAL, COURT OF WARDS, MANAGERS AND GUARDIANS.

Appointment of managers and guardians.

THE Court of Wards may appoint one or more managers for the property[1] of any ward, and one or more guardians for the care of the person of any ward under the charge of the Court and may control and remove[2] any manager or guardian so appointed.[3]

On any minor becoming a ward, the Court of Wards may, at its discretion, confirm or refuse to recognize any appointment of a person to be guardian of such minor which may have been made by a will.[4]

Collectors may appoint managers and guardians at salaries not exceeding Rs. 50 (including commission) and

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[1] There is nothing to prevent a manager being appointed to manage only a portion of the property of the ward.

[2] Although the Court of Wards has power to remove managers and guardians, they are entitled to reasonable notice, and, in case of their removal without just cause, to damages which may be estimated at the amount of their salaries for the period for which they are entitled to notice.

[3] Act IX (B. C.) of 1879, sec. 20. No one can be appointed manager or guardian against his will ; *Jadow Mulji* v. *Chhagan Raichand*, I. L. R., 5 Bom., 306 ; *Babaji* v. *Maruti*, I. L. R., 5 Bom., 310 ; 11 Bom. H. C. Rep., 182.

[4] Act IX (B. C.) of 1879, sec. 20. This is a departure from the policy previously adopted by the Legislature in recognising the testamentary appointments of guardians. Ben. Reg. V of 1799, sec. 2 ; Ben. Reg. I of 1800; and Act XL of 1858, sec. 7 gave absolute rights to testamentary guardians, and Act IV (B.C.) of 1870, sec. 31 enacted that when a guardian of a minor ward shall have been appointed by will, such person shall be appointed his guardian by the Court, unless the Board of Revenue, after a report, received from the Court of Wards, and after calling on the testamentary guardian to show cause, shall consider him disqualified or unfit. Although the Court of Wards has under the present law power to

Commissioners may appoint them at salaries not exceeding Rs. 200.[1]

They are also empowered by the rules to fine to the extent of one month's pay and allowances[2], suspend for a period not exceeding six months, or dismiss managers or guardians; but no manager or guardian can be dismissed by the order of any authority, inferior to that by which he was appointed to the post[3]

Choice of manager.

Except that the rules require managers to be appointed from the candidates selected by Government for the Subordinate Executive Service,[4] character and capacity for the trust are the only guides for the selection. Certain rules giving the preference to near relations of the ward and creditable servants of his family, were prescribed by Bengal Regulation X of 1793,[5] but it was soon found necessary to repeal this provision.[6]

Collector when to be deemed manager.

If no manager of the property of a ward is appointed by the Court of Wards, the Collector of the district in which the greater part of such property is situated, or any other Collector whom the Court of Wards may appoint in that behalf, is competent to do under the orders of the Court of Wards anything that might be lawfully done by the manager of such property.[7]

Power of manager.

Subject to the control of the Court of Wards,[8] which can at any time set aside any of his acts, or require him to perform particular acts, every manager appointed by the Court has power to manage all property, which may be committed to his charge; to collect the rents of the land

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appoint a guardian without notice to the testamentary guardian, it would ordinarily be in the interests of the ward that such notice should be given, as by the appointment the father has shown his confidence in the person appointed by him, and has presumably considered such person, as the best fitted to exercise the trust.

[1] Court of Wards Rules, sec. I, rule 8 (K. K. K.); sec. VIII (*a*), rule 3; and sec. VIII (*d*), rule 1 of 3rd April 1892.

[2] See *ante*, p. 333, note 1.

[3] Court of Wards Rules, sec. I, rules 8 (K. K. K.) and sec. VIII (*a*), rule 5, and sec. VIII (*d*), rule 1 of 3rd April 1892.

[4] Court of Wards Rules, sec. VIII (*d*), rule 3. Gazetted officers cannot be appointed managers without the sanction of Government; *ibid*, rules 1 & 2.

[5] Sec. 8.

[6] Ben. Reg. VII of 1799, sec. 26.

[7] Act IX (B. C.) of 1879, sec. 38.

[8] *Ibid*, sec. 20.

entrusted to him, as well as all other money due to the ward, and to grant receipts therefor; and may, under the orders of the Court, grant or renew such leases and farms as may be necessary for the good management of the property.[1]

General duty of manager.

Every manager must manage the property committed to him diligently and faithfully for the benefit of the proprietor, and must in every respect act to the best of his judgment for the ward's interest as if the property were his own.[2]

Specific duties of manager.

Every manager appointed by the Court of Wards shall[3]—

(*a*) have the care of so much of the property of the ward as the Court may direct;

(*b*) give such security[4] (if any)[5] as the Court thinks fit to the Collector duly to account for all such property and for what he shall receive in respect of such property;[6]

(*c*) continue liable to account to the Court, after he has ceased to be manager, for his receipts and disbursements during the period of his management;[7]

(*d*) pass his accounts at such periods and in such form as the Court may direct;

(*e*) pay the balance due from him thereon;

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[1] Act IX (B. C.) of 1879, sec. 39. The powers of a manager are confined strictly to the management of the property. He cannot, except under the express orders of the Court, contract for the sale or mortgage of the property or in any way charge the estate. He has all the usual powers incident to, and necessary for, the management of property. He can vote under the Bengal Drainage Act (VI (B. C.) of 1880), sec. 16 (2).

[2] Act IX (B.C.) of 1879, sec. 40, see *ante*, p. 312. As to the powers of a manager to appoint, suspend, or fine employés, see *ante*, p. 333.

[3] Act IX (B.C.) of 1879, sec. 41.

[4] In cash or promissory notes and not in landed property; Court of Wards Rules, sec. VIII (*j*), rule 1; for forms see App. O. of Rules.

[5] With the assent of the Court the security may be dispensed with; Court of Wards Rules, sec. VIII (*j*), rule 1.

[6] A natural guardian, when appointed manager or guardian, is not exempt from giving security if the Court requires him to do so. A testamentary guardian is exempt; Deputy and Sub-Deputy Collectors are not exempt; Court of Wards Rules, sec. VIII (*j*), rule 1. On the manager passing his accounts he is entitled to get his security back.

[7] See Act IX (B.C.) of 1879, sec. 46, *post*, p. 354.

(*f*) apply for the sanction of the Court to any act which may involve the property in expense not previously sanctioned by such Court ;

(*g*) sign all papers, deeds, documents, and writings which may be executed by him by virtue of his office ;[1]

(*h*) be entitled to such allowance, to be paid out of the property, as the Court may think fit for his care and pains in the execution of his duties ;[2]

(*i*) be responsible for any loss occasioned to the property by his wilful default or gross negligence.[3]

The duty of the manager is not only to realise rents.

Duty of manager as to tenants, &c.

The general well-being of the ryots, the investigation and record of their rights, the introduction among them of improved methods of cultivation, and the equalisation of the assessment are as much a part of his duty as the collection of rents. He should extend clearances, introduce the cultivation of new staples, the adoption of a better system of agriculture, and the appliance of machinery in the numerous ways in which it can save labour.[4]

Rules for preparation of jamabundi of revised rent.

Without the special permission of Government, the rent of any one ryot, or of the holders of any one ryoti holding, during any one year of the currency of a settlement, shall not be raised above the sum which would be double of the rent previously paid on account of the holding.[5]

Nor shall the revenue or rent demandable from a ryot, or from the holders of any one holding as above, in any one year in any case, exceed the revenue or rent payable by such ryot in the preceding year by more than 20 per cent., so that when the total enhancement made at the settlement amounts to 100 per cent. on the

[1] It is not now, as under the old law (Act IV (B.C.) of 1870, sec. 36), necessary that in signing papers he should describe himself as manager, but it is always very desirable that he should do so.

[2] This allowance may be altered from time to time, and although the word "allowance" generally refers to an annual or a monthly allowance, the general powers of the Court (secs. 16 and 18, *ante*, pp. 331, 333,) would permit special remuneration for special services.

[3] *i.e.*, suffer the same liability as an ordinary guardian, as to which see *ante*, chap. xix.

[4] Court of Wards Rules, sec. VIII (*i*), rule 2. As to proceedings against defaulters, see *post*, pp. 340, 346, 347.

[5] Court of Wards Rules, sec. VIII (*c*), rule 5. The most obvious reason for seeking for such permission would be that it can be clearly shown by comparison of the results of present measurements with the records of a previous settlement or other papers, that the area of lands actually held by the ryot is more than double the area which he held when his rent was last adjusted. *Ibid.*

rent previously paid, the maximum rent will in no case be demanded in less than five years.

In ordinary cases the period of progressive rise to a rent which is double the rent previously paid should extend to ten years.[1]

Occupancy rights.

Managers must not discourage the growth of legal occupancy rights, and where they have accrued must recognise them in the zemindari papers.[2]

Settlements of fair rents.

When a survey is being made and a record of rights being prepared,[3] the manager should be instructed to apply for a settlement of fair rents ;[4] where it is likely that the estate will remain under the Court's management for seven years or more; and in other special cases where he may expect to obtain an enhancement.[5]

When the estate is under settlement the manager, or a competent officer on his behalf should be present at the time of attestation ; and he should collaborate with the Settlement Officer and place before him all the papers and information available.[6]

Grant of leases.

If a ryot wishes to take a pottah for a term of years, his request should always be complied with, but pottahs should not be forced upon unwilling ryots. There should be as little interference as possible with existing general rates. Each ryot should be required to give a *kabulyat*, but they need not be annually renewed.[7]

Recovery of rent by certificate procedure.

Arrears of rent, or other demands recoverable as rent, due to an estate under the management of the Court of Wards, whether such arrears became due before or after the management devolved upon the Court of Wards, can be recovered by the certificate procedure provided for the recovery of public demands.[8]

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[1] Court of Wards Rules, sec. VIII (*c*), rule 5. In all settlement-proceedings reported for the confirmation of superior authority, it shall be certified that the provisions contained in this rule have been adhered to in preparing the jamabundis of revised rent payable under the new settlement ; *ibid*.

[2] Court of Wards Rules, sec. VII (*c*), rule 6.

[3] Act VIII, 1885, chap. x, *ante*, p. 328.

[4] Act VIII of 1885, sec. 104.

[5] Court of Wards Rules, sec. VIII (*c*), rule 8.

[6] Court of Wards Rules, sec. VIII (*c*), rule 8 D., which also see as to objections to draft records and appeals against decisions of Settlement Officers.

[7] Court of Wards Rules, sec. VIII (*c*), rule 10. The expenses of registration should be equally divided between the estate and the ryot ; *ibid*.

[8] See Acts I (B.C.) of 1897, secs. 6, 7, 8 ; and I (B.C.) of 1895, secs. 7 (*f*) and (*g*), 8, 9, 14, and 27. Except where a survey has been made, and a record of rights prepared or the estate has been declared by a formal order of the Board of Revenue to be ripe for the application of the certificate procedure, the manager must not use that procedure; Court of Wards Rules, sec. VIII (*c*), rule 3 ; Circular Order No. 13 of February 1896.

Recovery of interest on arrears of rent.

Any amount of interest which has accrued due on arrears of rent or other demand recoverable as rent payable to the manager, may be recovered in any manner and by any process according to which such arrears may be recovered under any law for the time being in force, and any Court or officer who is competent to make an order or certificate in execution of which such arrears or other demand are recoverable, may direct that any costs incurred by the manager in obtaining such order or certificate, and in executing the same, shall be recovered in the same manner and by the same process as if the amount thereof had been included in the order or certificate.[1]

Supervision over manager.

Commissioners and Collectors must positively satisfy themselves that each manager is and continues to be mentally and physically competent for his work; that his office and books are in proper order; that his system of management is careful, and sound; that the rent collections are promptly and regularly made and duly brought to credit; and generally that the affairs of the ward are being honestly and efficiently managed.[2]

Application of moneys received by manager.

All moneys received by the manager shall be applied to the purposes hereinafter mentioned in accordance with such instructions as the Court of Wards may from time to time give in that behalf.[3] Unless the Board of Revenue shall specially otherwise direct, priority shall be given to the purposes included in Class I over those included in Class II, and priority shall be given to the purposes included in Class II over those included in Class III.

Class I.

The payment of all charges necessary for the maintenance,[4] education and religious observances of the ward and his family, for the management and supervision of

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[1] Act III (B.C.) of 1881, sec. 10, amending Act IX (B. C.) of 1879, sec. 63.

[2] Court of Wards Rules, sec. I, rule 28.

[3] Act IX (B.C.) of 1879, sec. 48, as amended by Act III (B.C.) of 1881, sec. 5, and Act IV of 1892, sec. 9. As in the case of other acts of the manager, these payments are subject to the control of the Court; Act IX (B.C.) of 1879, sec. 20, *ante*, p. 336.

[4] See *ante*, chap. xxii.

the property of the ward,[1] and the discharge of the instalments of Government revenue and of all cesses and other public demands from time to time due in respect of such property or any part of such property.[2]

CLASS II.

The payment of all rents, cesses and other demands due to any superior landlords in respect of any land held on behalf of the ward, the liquidation of debts payable by the ward,[3] the payment of all expenses which may be necessary to protect the interests of the ward in the Civil Courts or otherwise,[4] the maintenance in an efficient condition of the estates, buildings and other immoveable property belonging to the ward, and the payment of such religious, charitable, and other allowances as were paid out of the proceeds of the property before it came under the charge of the Court, and such allowances and donations befitting the position of the ward's family as the Court may authorize to be paid.[5]

CLASS III.

The improvement of the land and property of the ward, and the benefit of the ward and his property generally.[6]

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[1] The manager can only pay the allowance sanctioned by the Court under sec. 22 (*post*, p. 352), or such other sums as may be allowed under sec. 16, *ante*, p. 331.

[2] As for instance zemindari dâk cess covenanted to be paid by the Court in a putnee lease ; Court of Wards Rules, sec. VIII (*k*), rule 1. The manager must pay income-tax ; Act II of 1886, sec. 22, *ante*, p. 138.

[3] This might include not only such debts as the ward could be sued for, but also such debts as would affect his property.

[4] See Act IX (B.C.) of 1879, sec. 53, *post*, chap. xxxvi.

[5] This includes donations and subscriptions to dispensaries and schools. The Court of Wards looks with favour on expenditure for the former purpose, and also approves of money being spent on real primary schools for the benefit of the poorer classes ; Court of Wards Rules, sec. I, rule 23.

[6] Court of Wards Rules, sec. I, rule 23 (4) enumerates the following as improvements :—

(*a*) Survey and records of rights:

(*b*) Gilandazi or other irrigation works and sinking wells or digging and improving tanks for the improvement of agriculture :

(*c*) Embankments, if undertaken with the advice of professional officers of Government (see Court of Wards Rules, sec. VIII (*k*), rule 3) :

Power to invest surplus.

If any surplus remains after providing so far as the Court of Wards or the Commissioner, subject to the control of the Court in cases of particular difficulty,[1] may think fit for the objects for which the moneys received by a manager are to be applied,[2] the same shall be applied[3] in the purchase of other landed property, or invested at interest on the security of—

promissory notes, debentures, stock, and other securities of the Government of India, or of the United Kingdom of Great Britain and Ireland ;[4]

bonds, debentures, and annuities charged by the Imperial Parliament on the revenues of India ;

(*d*) Model farms and experiments in farming for the benefit of the estate :

(*e*) Planting of mango topes or other valuable trees on *khas* lands :

(*f*) Construction and maintenance of branch or feeder roads and of communications which cannot reasonably be required from District Boards :

(*g*) Village sanitation, and the making, cleansing, and protection of tanks :

(*h*) Reclamation of waste lands :

(*i*) Establishment and improvement of hâts or markets :

(*j*) Advances to cultivators in the shape of either seed or cattle, or money to be expended on some permanent improvement, when given on the security of long leases, and conditional on the payment of enhanced rent.

(*k*) In the case of richer and more extensive estates consideration may be given to large and comprehensive undertakings such as railways, tramways or canals. In all these matters the benefit of the particular estate, and not that of the country generally, is to be considered. Before undertaking any improvements managers must obtain the Courts' sanction and should include them in their budget ; Court of Wards Rules, sec. I, rule 24. In submitting proposals for agricultural improvements officers must consider and discuss how the cost is to be distributed between landlord and tenant ; Court of Wards Rules, sec. VIII (*k*), rule 2.

[1] Court of Wards Rules, sec. I, rule 8 (*l.l.*)

[2] *Ante*, pp. 341, 342.

[3] Act IX (B. C.) of 1879, sec. 50 ; Act III (B. C.) of 1881, sec. 6.

[4] Investment in Government Securities must be through the Comptroller-General, who will correspond and be in account with the Accountant-General only, who, in his turn, will correspond and be in account with the Collectors or other officers in charge of wards estates. The securities will stand in the name of the Comptroller-General and will be kept in his custody. He is entitled to a commission of one-eighth per cent. for the purchase, and of one quarter per cent. for drawing and remitting interest ; Court of Wards Rules, sec. VIII (*l*), rule 1.

stock or debentures of, or shares in, railway or other companies, the interest whereon has been guaranteed by the Secretary of State for India in Council;

debentures or other securities for money paid by, or on behalf of, any municipal body under the authority of any Act of a legislature established in British India;[1]

or such other securities, stocks, or shares, guaranteed by the Government of India or the Government of Bengal as to the Court of Wards shall seem fit.[2]

The Court of Wards has expressed its preference[3] for the investment in

(*a*) purchase of patni tenures settled at an unduly low rent, intercalated holdings of outsiders, and neighbouring villages to get a better boundary line;

(*b*) purchase of patni, darpatni, or other mokarrari rights, subordinate to the estates, or tenures of the ward;

(*c*) release of estates or tenures belonging to the ward which have been leased in usufructuary mortgages;

Purchase of landed property.

(*d*) purchase of house property in Calcutta or other places, where it may be anticipated that houses will let for an adequate rent;

(*e*) building houses in sudder stations or other places on land already belonging to the ward, where the houses are likely to let at a adequate rent;

(*f*) purchasing building sites, and building houses thereon.[4]

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[1] This would include a District Board; Ward's Manual, p. 27. Provincial, municipal, and Railway debentures are to be forwarded to the Accountant-General. Provincial debentures will be endorsed and passed on to the Comptroller-General, municipal and railway debentures will remain with the Accountant-General, who will collect the interest and forward it, less commission, to the Collector or Officer in charge; Court of Wards Rules, sec. VIII (*l*), rule 1.

[2] A loan by a minor's separate estate to a joint estate in which he has a share could not be made; but there is no objection to relieving one portion of his property by the savings from another portion; Ward's Manual, p. 27.

[3] Rules of Court of Wards, sec. I, rule 23.

[4] The soundness of the investment must be carefully ascertained by the manager before applying for sanction. With his application he must submit a statement showing as far as possible (*a*) the net profits of the property calculated in accordance with the method laid down in Column 7, Table V of the form of Return No. XXXI of Appendix H of the Rules (which see); (*b*) the liabilities to which it is subject, and (*c*) other particulars affecting its value, including approximately the rate of interest the investment is expected to yield.

In the case of patni, certificate, and other sales this detailed enquiry will usually not be possible, and

Receipts and disbursements should, whenever possible, be made through the Government Treasury, but a manager cannot refuse to receive cash tendered by persons having payments to make.[1] In order to make the receipt valid as to details a person paying money through the Government Treasury should get the chalan initialled in the manager's office.[2] Receipts and disbursements.

To meet ordinary and contingent charges a permanent advance will be sanctioned by the Commissioner for each estate. The Commissioner must settle in each case the character of the charges to be met from such advance, and the amount of the advance.[3] The manager must keep in his office a register of all sums spent from his permanent advance.[4] Permanent advance.

When the manager's head-quarters are at a sudder station, or at a sub-division, disbursements (not from the permanent advance) are to be made from the treasury by cheques signed by the manager except where a landlord objects to receive a cheque.[5] Payments.

On the 31st of March of each year the manager must certify the amount of his cash balance detailing his outstanding cheques.[6] Certificate of cash balance.

On the first of each month, or as soon after as possible, the manager will submit his establishment bill to the Collector for audit, and no money shall be drawn or disbursed on account of pay of establishment until this bill be passed; but in cases in which the manager is well qualified and can be thoroughly relied on, the Collector may refrain from exercising the check which the preaudit of the bill gives.[7] Establishment.

The above rules[8] as to payment of receipts and disbursements, permanent advance, payment, certificate of cash balance, and establishment bill are only strictly applicable when the manager's office is at a sudder station, or at the head-quarters of a sub-division, and Commissioners are authorised to exempt all large estates with managers whose status is equal to that of a Deputy Collector from compliance with them.[9] Exemption of certain managers.

When the ward's estate has a separate treasury, the Collector must inspect it once in each half year and report the result of his Separate treasury.

Collectors must decide to the best of their ability on the facts before them whether to buy or not; but even in such cases all possible enquiries must be made in order to guard against the risk of making a bad investment; Court of Wards Rules, sec. I, rule 23.

[1] Court of Wards Rules, sec. IV, rule 18; see also rules 19 and 20.

[2] *Ibid*, rule 20.

[3] *Ibid*, rule 21.

[4] *Ibid*, rule 24

[5] Court of Wards Rules, sec. IV, rule 22. Vouchers and orders to pay must be endorsed as cancelled as soon as the cheque discharging them is filled up, and before it is signed; *ibid*.

[6] Court of Wards Rules, sec. IV, rule 23.

[7] Court of Wards Rules, sec. IV, rule 25.

[8] Court of Wards Rules, sec. IV, rules 18 to 25.

[9] Court of Wards Rules, sec. IV, rule 26.

inspection to the Commissioner who must bring to the notice of the Court any irregularities. The Commissioner must inspect it once a year, and report to the Court when necessary.[1]

Monthly return of collections in arrear.

For every estate in which the collections are in considerable arrear, the manager must submit a monthly return of collections and outstandings. Collectors must satisfy themselves personally that care is being taken to realise the dues of the estate, and to manage it efficiently. This return may be dispensed with at the Collector's discretion for estates in which collections are regular and not heavily in arrears, the Collector's supervision being exercised by means of the quarterly return.[2]

Quarterly return by manager to Collector.

The quarterly return is to be submitted in duplicate by the manager to the Collector on or before the 10th of July, October, January, and April. Both in this return and in the monthly return the explanations of arrears which have been outstanding for some time should be directed to showing what has been done by the manager towards the realisation of the arrears *during the period to which the statement refers.*[3] A statement of additions and reductions of rent sanctioned by the Commissioner with a brief explanation should accompany the return.[4]

Return by Collector to Commissioner.

The Collector on receipt of the return shall forward one copy to the Commissioner, so as to reach him by the 20th of each month as above The return will be examined and reviewed in the Commissioner's office, but will not be forwarded to the Board unless specially called for. It is open to the Commissioner, when in any special case he thinks that an estate is well managed and the arrears are small, to dispense with the quarterly return, and substitute its half-yearly submission to him by the Collector on the 20th of April and October.[5]

Half-yearly return in special cases.

Compulsory proceedings against tenants in arrear.

On each quarterly return the Collector should carefully consider whether the reasons given for not having taken compulsory proceedings against any tenants who are in arrears are sufficient. Substantial reasons should always be required for deferring such

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[1] Court of Wards Rules, sec. IV, rule 27.

[2] Court of Wards Rules, sec III, rule 6, which see as to the form of return.

[3] Court of Wards Rules, sec. III, rule 7. This return shews the rent and cesses due in the previous and current year collected in this and previous quarters, and also the remissions sanctioned and the gross annual rental, see Return XXI, App. G to Court of wards Rules.

[4] Court of Wards Rules, sec III, rule 11. The rents for excess lands found in possession of tenants should be entered in this return at once, as soon as the lands have been discovered and the rents demandable on them ascertained, although no legal decree has been obtained for the rents;' *ibid.*

[5] Court of Wards Rules, sec. III rule 8.

proceedings beyond the third quarter of the year against such ryots as have not paid up any portion of the rent of the year.[1]

Annual return by manager to Collector.

On or before the 1st of May in each year, or if the time is specially extended by the Commissioner, not later than the 1st June, the manager must submit to the Collector an annual return in triplicate for the property of each separate proprietor or body of proprietors.[2]

Resolution of Collector.

The Collector is, after due examination of the return in his office, to record his resolution on it in two parts. Part I will contain his remarks on the details of the return, and will be forwarded to the manager for his information and guidance. Part II will comprise his remarks on the copies of the return containing the total figures, and is to be forwarded with the return in duplicate to the Commissioner, so as to reach his office on the 10th June. The Commissioner in his turn will, after similar examination and review, forward with his and the Collector's remarks one copy of the return to the Board, so as to reach their office on the 1st of July.[3]

Annual report by manager.

With the return the manager must submit an annual report on the management of each property in the form of a connected narrative.[4]

The manager's report should contain information on the following points[5]:—

(*a*) For each property it should be shewn at what date, under what circumstances, and under what provision of law it came under Government care with the names and ages of the wards.

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[1] Court of Wards Rules, sec. III, rule 9. Action under Ben. Reg. VIII of 1819 should invariably be taken on the first opportunity against patnidars who are in arrears, unless the Collector's express sanction to withhold such proceedings is obtained, and interest at the full rate allowed by law must be exacted from all such tenants, and in general from all middlemen on all rents not paid according to stipulated instalments. In regard to cultivating ryots a discretion may be used in foregoing interest where payment is eventually made without having to resort to coercive measures; *ibid*, rule 10.

[2] Court of Wards Rules, sec. III, rule 12. As to the form and contents of the return, see Form XXXI (Appendix H); and Test Table (Appendix I); Court of Wards Rules, sec. III, rules 13 and 15. In the return a "Suspense Account" should be avoided, if possible, see Court of Wards Rules, sec. IV, rule 17. No transaction relating to the permanent advance should appear except the original debit and the credit for actu repayment; Court of Wards Rules, sec. IV, rule 21, as amended on the 2nd May 1895.

[3] Court of Wards Rules, sec. III, rule 14.

[4] Court of Wards Rules, sec. III, rule 16.

[5] Court of Wards Rules, sec. III, rule 17. In the first report the information should be given in full; but in subsequent reports it is sufficient to refer specifically to such paragraphs of the first or any

(*b*) The situation and area (if possible) of each item of landed property should be stated, and a brief account given of the natural features and products.

(*c*) The character of the estate and tenures making up the property should be explained, and it should be shewn how much is held direct from Government, how much under perpetual leases (as patnis or the like), how much under temporary lease, how much as rent-free holding.

(*d*) The nature and *personnel* of the managing agency should then be stated, and its efficiency or the reverse noticed.

(*e*) The general features of the management should be described, and it should be shewn what portion of the property is let in perpetual lease, what portion in temporary lease, and what portion is managed *khas*.

(*f*) The financial results should for the sake of completeness be briefly summarized, and the position of the property in regard to liabilities be noticed.

(*g*) Any improvements in the landed property made by the management should then be noticed. In this connection anything done for the encouragement of education or in the way of establishing dispensaries should not be forgotten.

(*h*) The condition of the tenantry, and the relations between landlord and tenant, as illustrated by the management, should then be fully discussed.

(*i*) Any extension of cultivation, any improvements of agriculture, the introduction of new crops, or change in the proportions of old staples cultivated should not be overlooked.

(*j*) Finally the arrangements made for the support, care, and education of the wards should be stated, and their well-being or otherwise, physical, intellectual, and moral, briefly noticed.

Collector's and Commissioner's reports.

Each Collector and Commissioner is to submit an annual report on the estates in his district and division respectively. The Collector's report will be due in the Commissioner's office on the 10th June, and the Commissioner's report will be due in the Board's office on the 1st July.[1]

Conciseness.

The reports must contain the greatest amount of information in the fewest words possible. No unnecessary contentious matter is to be introduced. An intelligent review of the main facts and

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previous report relating to each of the points as are still applicable, and to describe only such changes and other events as have taken place during the year under report. In some cases no information may be available on some of these heads. In others there may be materials for other topics; *ibid.*

[1] Court of Wards Rules, sec. III, rule 19. As to the necessity for punctuality, see rule 24.

occurrences of the year is required. Extracts from the reports of subordinates are to be summarised, not strung together. Definite proposals should form the subject of separate communications.[1]

The subjects should be separately noticed, but only so far as illustrated by the figures of the year. Where all that has to be said has already been mentioned in recent reports, such reports should be expressly referred to.[2] Range.

The following order of subjects is to be observed[3] :— Order of subjects.

PART I.—*General Review of Management*—

1. Preliminary.[4] 2. Number of estates under management. 3. Revenue and cesses due to Government. 4. Rent and cesses due to superior landlords. 5. Collections of rent and cesses due to estates. 6. Balances of rent and cesses due to estates. 7. Debts due by estates. 8. Management charges. 9. Rates. 10. Audit of accounts by the Examiner of Local Accounts. 11. Schools, dispensaries and works of improvement. 12 Agricultural improvements or experiments. 13. Total receipts and disbursements. 14. Surveys and records of rights. 15. Operation of the certificate procedure. 16. Condition of tenantry. 17. Education of wards.[5] 18. Working of the laws. 19. Merits of officers.[6]

PART II.—*Account for the years of report of important estates with a Rent-Roll of Rs.* 50,000 *and upwards.*[7]

PART III.—*Special notices of Estates taken in charge or released during the year.*[7]

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[1] Court of Wards Rules, sec. III, rule 21.

[2] *Ibid*, rule 22.

[3] *Ibid*, rule 25. Each subject is to be commenced on the top of the first or third page of a sheet of paper, rule 23.

[4] The Collector's reports should begin by giving a memorandum of the date of receipt of the manager's returns and reports. The Commissioner's report should begin with a memorandum of the date of receipt of the returns and reports from the Collectors; Court of Wards Rules, sec. III, rule 27.

[5] The personal education and progress of each male minor should be reviewed. The report should show under whose care each ward is placed, the arrangements made for his education, when and by whom his progress and acquirements were last tested, and with what result; and how his acquirements stand as compared with the average of boys of his age who are educated at Zillah Schools; Court of Wards Rules, sec. III, rule 28.

[6] The qualifications and conduct of managers and of assistant managers on a monthly salary of Rs. 100 and above, and the control exercised by Collectors over the management of estates should be recorded in the prescribed form; Court of Wards Rules, sec III, rule 29.

[7] The estates in Parts II and III should be arranged entirely according to the gross rental. Part II should be devoted to such particular estates as are worth individual notice. Roughly speaking, these may be

PART IV.—*Special notices of Encumbered Estates in the Chota Nagpore Division.*

APPENDIX.—*Financial Management of Estates.*[1]

Budget estimates.

On or before the 15th of January, the manager must send to the Collector in triplicate the budget estimate for the succeeding financial year.[2] The Collector must send two of the copies to the Commissioner not later than the 1st February, and the Commissioner must send a copy to the Court before the 1st March.

Disbursements.

Disbursements may be made in accordance with the Collector's scheme[3] if it has been sanctioned. With the exception of the Legal Remembrancer's fees, which may be paid on his bill, and of debts which may be paid without sanction all other items of expenditure under heads which are not covered by the scheme but are included in the budget, may, after the budget has been passed by the Court, be incurred under the sanction of the Commissioner, after he has carefully scrutinized the detailed estimates and the reason for the expenditure.[4]

Exceptional items of expenditure.

The Commissioner may also sanction expenditure not in the budget, not exceeding Rs. 200 on any one item, provided it can be met from general savings in the budget. In all other cases the previous sanction of the Court must be obtained before disbursement.[5]

Monthly accounts.

Every manager, whose office is not at or close to the head-quarters of the district, shall submit by the 15th of each month a monthly account current of cash transactions with vouchers of his receipts and disbursements and abstracts of receipts, disbursements and cash balances to the managing Collector.[6]

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taken to be estates with a rent-roll of Rs. 50,000 and upwards; but it is not necessary to include every such estate if there is nothing to be said about it, and, on the other hand, probably some estate, with a rent-roll below Rs. 50,000, might have a history of the year worth recording. The notices of estates in Part II should contain brief explanations of any abnormal increase or decrease in the rent-roll and the principal items of receipts and expenditure of the year under report as compared with those of the previous year. Estates coming under Part III will, of course, be excluded from Part II. Part III should give an account of all estates of which charge has been taken or given up during the year; Court of Wards Rules, sec. III, rule 30.

[1] For form, see Court of Wards Rules, sec. III, rule 31, and Appendix H.

[2] Court of Wards Rules, sec IV, rule 1. For form see Appendix K to Rules. For particulars to be inserted in the udget, see sec. IV, rules 2, 3, and 4.

[3] *Ante*, p. 328.

[4] Court of Wards Rules, sec. IV rule 5.

[5] Court of Wards Rules, sec. IV rule 6.

[6] Court of Wards Rules, sec. IV, rules 7 and 9. For form see Appendix N to Rules. Accounts for March may be kept open for a period not exceeding one month; Court of Wards Rules, sec. IV, rule 17.

Audit.

The Collector, or with the sanction of the Commissioner, any Deputy Collector, shall audit these accounts and especially satisfy himself—

(*a*) that the expenditure is properly vouched for, and that it has been incurred under proper sanction and is free from objection :

(*b*) that the opening balance and closing balance are correctly shown and tally with those shown in the personal ledgers in the treasury, all discrepancies being reconciled before the accounts and abstracts are passed :

(*c*) that more money than is necessary is not left in the hands of the manager :

(*d*) that the manager has applied the funds in the manner directed by secs. 48 and 50 of the Act.[1]

With the sanction of the Court the Commissioner may assign the duty of auditing the accounts of managers to any other person than the Collector or a Deputy Collector.[2]

Appointment of guardians.

The only rules which control the appointment of guardians are as follows :—

No person to be guardian who can succeed a ward.

(1) No person (other than the mother of a ward or a testamentary guardian) who would be the next legal heir of a ward, or would otherwise be immediately interested in outliving a ward[3] can be appointed to be his guardian.[4]

Guardian of female ward.

(2) A female of the same religion shall, except in the case of a testamentary guardian, be appointed guardian of a female ward, preference being given to female relatives[5] if any such be eligible ; but no guardian shall ordi-

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[1] *Ante*, pp. 341, 343. Court of Wards Rules, sec. IV, rule 8. When the manager's office is at or close to the head-quarters of the district, the audit must be carried out within the first half of each month in the office of the manager by examination of the books in actual use. The audit must in all cases be full and a quarterly statement shall be submitted by the Collector to the Commissioner, showing for each estate the date of the audit in each month of the previous quarter and the result. This statement shall include all estates and not merely those whose accounts are professionally audited ; *ibid.*

[2] Court of Wards Rules, sec. IV rule 10.

[3] For instance, a person who is entitled in reversion on the death of the ward, or is possessed of an insurance on the life of the ward.

[4] Act IX (B.C.) of 1879, sec. 44. This would even exclude the father in the case of the son possessing separate property.

[5] Not necessarily in order of propinquity.

narily be appointed or continued for a female ward if she has an adult husband.[1]

Custody, education and residence of wards.

The Court of Wards may[2] make such orders as to it may seem fit in respect of the custody, education,[3] and residence of a minor ward,[4] and such minor members of the ward's family as are under its charge.

Wards of different families should not be placed under the same roof and the same guardian without the special sanction of the Board of Revenue.[5]

School.

Wards should be sent to the best school in their own or some neighbouring district. The Board should arrange, in communication with the Director of Public Instruction and Collectors, the course best to follow in each case looking to the age and present proficiency of each ward.[6]

Initiation into zemindari management.

Between the ages of 18 and 21 the ward should be initiated into the system of management of his estate. Whenever a ward attains the age of 18, the Collector must report to the Commissioner the steps which he proposes to take gradually to teach the ward the business of the estate.[7]

Allowance for ward and his family.

The Court of Wards must allow[8] for the support[9] of each ward and of his family,[10] such monthly sum as it thinks fit (if any) with regard to the rank and circumstances of the parties.[11]

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[1] Act IX (B. C.) of 1879, sec. 45, see *ante*, pp. 59, 65, 96.

[2] Act IX (B. C.) of 1879, sec. 21.

[3] As to the duties of a guardian with reference to the religious and secular education of his ward, see *ante*, chap. xxii. As to the duty of the Collector, see Court of Wards Rules, sec. III, rule 1, *ante*, p. 328.

[4] The Court is not obliged to appoint a guardian, but may make other arrangements for the ward's custody, education or residence such as by sending him to a school or college.

[5] Court of Wards Rules, sec. VIII (*e*), rule 2.

[6] *Ibid.*

[7] Court of Wards Rules, sec. VIII (*e*), rule 4.

[8] Act IX (B. C.) of 1879, sec. 22.

[9] "Support" would include education, residence, servants and other expenses such as of journeys, amusements, carriages and horses, etc., which may be suitable to the ward's position in life, and may be justified by his income. Apart from the monthly allowance, the Court would under sec. 16 (*ante*, p. 331) be able to provide for suitable expenditure.

[10] For the purposes of this section "family" would apparently include not only the wife and children of the ward, but such relations as the ward would, if an adult, be either legally or morally required according to the usages of his religion, race or family to support.

[11] Where the Court has not taken charge of the person of the ward (*ante*, p. 323) the allowance should be paid to the legal guardian of the ward's

No marriage of a ward should be authorized, and no steps or negotiations preliminary to marriage be recognized, without the previous sanction and approval of the Court.[1] Marriage of ward.

Subject to the control of the Court of Wards,[2] the guardian (if any) appointed to the care of a ward is charged with the custody of the ward, and must look to his maintenance, health, and education.[3] General duty of guardian.

Every guardian appointed by the Court of Wards must[4]— Specific duties of guardian.

(*a*) give such security[5] (if any[6]) as the Court thinks fit to the Collector for the due performance of his duty ;

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person, but where it has charge of such person the allowance should be paid to the guardian appointed by the Court, or, where there is no such guardian, to such other person as to the Court may seem fit. The Act does not contemplate the guardian of the ward, as such, having anything to do with the ward's family in the absence of a special order, but if any money be paid to him for the support of such family, he would be accountable therefor in the same way as for other moneys received by him as such guardian. In fixing the amount of maintenance, the Court is not obliged to consider the fact that a ward has a parent able to support him ; but it would probably be guided to a great extent by the rules followed by Civil Courts, *ante*, pp. 223, 226 to 231.

[1] Court of Wards Rules, sec. VIII (e), rule 5. Collectors should intimate to the guardians and relatives of wards that at least three months' notice must be given of their wish to celebrate any marriage, otherwise they will run the risk of the Court refusing to authorize payment of the expenses of the marriage out of the ward's funds. An estimate of the proposed expenditure must be submitted with the notice for the sanction of the Court ; *ibid.* This is the only control which the Court can exercise over the marriage of its wards. It might remove a guardian who acted improperly with regard to the marriage. As to the marriage of minors, see *ante*, chap. xxiii.

[2] Act IX (B.C.) of 1879, sec. 20.

[3] Act IX (B.C.) of 1879, sec. 42 Under Act IV (B.C.) of 1870, sec. 6 the Collector in charge of a ward has in the absence of a guardian a right to the custody of the ward's person. Under the present law the Collector can provide for the temporary custody of a minor proprietor (Act IX (B.C.) of 1879, sec. 30, *ante*, p. 326) and as representing the Court, the Collector can, under sec. 7 (*ante*, p. 322), take charge of a ward's person and of the persons of such of his family as have come under the charge of the Court.

[4] Act IX (B.C.) of 1879, sec. 43.

[5] In cash or promissory notes, and not in houses or landed property ; Court of Wards Rules, sec. VIII (*i*), rule 1. For form see Appendix P. to Rules.

[6] The Court may dispense with the security. Testamentary guardians are exempt from giving security ; Deputy and Sub-Deputy Collectors are not exempt ; Court of Wards Rules, sec. VIII (*j*), rule 1.

(*b*) pass his accounts at such periods and in such form as the Court may direct ;

(*c*) pay the balance due from him thereon ;

(*d*) continue liable to account to the Court, after he has ceased to be guardian, for his receipts and disbursements during the period of his guardianship ;[1]

(*e*) apply for the sanction of the Court to any act which may involve expense not previously sanctioned by the Court ;

(*f*) be entitled to such allowance, to be paid out of the property of the ward, as the Court may think fit, for his care and pains in the execution of his duties.[2]

Sums due recoverable as demands.

Every sum due to the Court of Wards from a manager or guardian, or from the sureties of a manager or guardian, or from any officer or servant employed under the Court of Wards, or from the sureties of any such officer or servant, is recoverable as a demand under Bengal Act VII of 1868, or any similar law for the time being in force.[3]

Court may order guardian or manager to make over property.

The Court of Wards or the Commissioner[4] may order any past or present manager or guardian, or past or present officer subordinate to a manager or guardian, to deliver up his accounts or any property which may be in his possession within such time as may be fixed by the Court.[5]

Penalty for disobeying order.

Any person who refuses to comply with such order may be punished by order of the Court of Wards, or of the Collector[6] with simple imprisonment and attachment of his property until the order is complied with.

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[1] See Act IX (B.C.) of 1879, sec. 46.

[2] *Ante*, p. 339, note 2. This allowance need not be paid out of the sum allowed for the support of the ward. The Court can make such arrangement for the payment as it thinks fit.

[3] Act IX (B.C.) of 1879, sec. 46 ; see Acts II (B.C.) of 1871, VII of 1880, I (B.C.) of 1895 and I (B.C.) of 1897 ; in addition there are remedies by suit, see *ante*, pp. 312 to 314.

[4] Court of Wards Rules, sec. I, rule 8 (*b*).

[5] Act IX (B.C.) of 1879, sec. 47. This order may be made at any time.

[6] Court of Wards Rules, sec. I, rule 8 (*o*).

Provided that the Collector may release any person who has been so imprisoned on his furnishing sufficient security for his attendance and for the delivery of the accounts or property required within such time as the Collector shall think fit. The Collector may at any time rescind such order of release, and direct that effect shall be given to the previous order of imprisonment.[1]

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[1] Act IX (B.C.) of 1879, sec. 58, as amended by Act III (B.C.) of 1881, sec. 8. The Court or Collector when imposing a penalty must make a formal record of the same with the reasons or grounds thereof; Act IX (B.C.) of 1879, sec. 64. A recusant manager in addition to the above penalty is liable to fine; Act IX (B.C.) of 1879, sec. 59, *ante* p. 330. The release of the estate from the control of the Court does not put an end to the order for imprisonment; Ward's Manual, p. 29.

CHAPTER XXXIII.

Bengal Court of Wards—Miscellaneous.

Protection from sale for arrears of Government revenue.

The Court of Wards Act[1] protects estates which are the sole property of a minor or minors[2] from sale for arrears of Government revenue under certain circumstances.

The portions of the Act which deal with this subject are as follows :

Estate under charge of Court exempt from sale.

"Section 23,[3] cl. 1.—Except as hereinafter provided by sec. 23A, every estate,[4] and subject to the provisions of sec. 14 of Act XI of 1859,[5] every share or part of an estate for which a separate account has been opened under sec. 10 or sec. 11 of the said Act, or under sec. 70 of Bengal Act VII of 1876,[6] shall be exempt from sale for

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[1] Act IX (B.C.) of 1879, as amended by Act III (B.C.) of 1881, sec. 4.

[2] Where the minor has only a share in a joint undivided estate, and no separate account thereof has been opened under sec. 10 or sec. 11 of Act XI of 1859, or under sec. 70 of Act VII (B.C.) of 1876, his share is not exempt from sale, and, where the estate has come to the minor otherwise than by the regular course of inheritance or by virtue of the will or of some settlement made by some deceased owner thereof, the estate is only exempt from sale for arrears which have accrued while the estate has been under charge of the Court ; Act IX (B.C.) of 1879, secs. 23 & 24. If the arrears accrue in an estate, share or part, which is not exempted from sale, the Collector should allow every facility to the manager to pay up the arrear. The manager on payment of the whole arrear could bring a contribution suit on behalf of his ward ; Court of Wards Rules, sec. I, rule 13; and App. A. (iv).

[3] As amended by Act III (B.C.) of 1881, sec. 4. *Cf.* Mad. Reg. V of 1804, sec. 14, *post*, chap. xxxv.

[4] A joint undivided share is not exempt, see *ante*, p. 331.

[5] *i.e.*, if the arrears cannot be otherwise realized, the entire estate may be sold.

[6] This exemption only applies to arrears which accrue after separation; see Court of Wards Rules, sec. I, rule 14.

arrears of Government revenue which have accrued whilst such estate, share or part has been under charge of the Court :

Arrears first charge.

"Provided that all such arrears of revenue shall be the first charge upon the sale-proceeds of any estate, share or part which may be sold for any other cause than for such arrears of revenue.

Recovery of arrears of revenue due at time when estate ceases to be under charge of Court.

"cl. 2.—If at the time when such estate, share or part ceases to be under the charge of the Court of Wards, an arrear of revenue is due on account thereof, the Collector may attach such estate, share or part and collect the rent, cesses and other demands due, and all arrears thereof, managing such estate, share or part either directly or through a manager, or by farming it for a period not exceeding five years, as he may think fit :

"Provided that when such estate, share or part has been attached under the provisions of this clause, the proceeds shall be paid to the Collector, and the Collector after deducting the claims of Government for revenue and other public demands, together with any interest which has accrued upon such public demands other than Government revenue, and the charges of management, due up to the date of making such deduction, shall release such estate, share or part from attachment and pay any balance of the proceeds still remaining in his hands to the proprietor of such estate, share or part or to his duly constituted agent,[1] and shall furnish such proprietor or agent with an account of the receipts and expenditure extending over the time when such estate, share or part was under attachment.

Conditions, under which estate may be sold for arrear of revenue accrued under Court.

"Section 23A.—Notwithstanding anything in cl. 5, sec. 8, Reg. I of 1793, or in sec. 23 of this Act contained, any

[1] Where the proprietor is a minor and the Court of Wards has under sec. 9 (*ante*, p. 323) withdrawn from the charge during the minority of the proprietor, it does not appear from the Act to whom the balance is to be paid. A guardian is not a constituted agent, but it would probably be held that payment to the legal guardian of the minor's property, whether natural, testamentary, or appointed, would be sufficient to satisfy the requirements of this section.

estate, share or part of an estate on which an arrear of revenue has accrued while under the charge of the Court, may at any time be sold under the provisions of the law for the time being in force for the recovery of arrears of Government revenue, if the Court has certified in writing that the interests of the ward require that such estate, share or part be so sold, and has stated in writing the reasons upon which it has arrived at such conclusion.[1]

Estate belonging to minor not to be sold for arrears of revenue.

"Section 24. No estate the sole property of a minor or of two or more minors, and descended to him or them by the regular course of inheritance, or by virtue of the will of, or some settlement made by, some deceased owner thereof, shall be sold for arrears of revenue accruing subsequently to his or their succession to the same, until such minor or one of such minors has completed his age of twenty-one years, but all arrears of revenue shall be the first charge upon the proceeds of such estate if the estate is sold for any other cause during such minority.

But Collector may attach estate.

"The Collector may, on an arrear so accruing on any such estate, attach the estate and collect the rents and all arrears of rent due, managing the estate either directly or through a manager or by farming it, as he may think fit, for a period not exceeding ten years, nor extending beyond the time when such minor or one of such minors completes his age of twenty-one years.[2]

When exemption from sale for arrears of revenue applies.

"Section 25. The exemption from sale for arrears of revenue given by sec. 24 shall only apply to cases in which a written notice of the fact that the estate is the sole property of one or more minors, and entitled to such exemption, has been served on the Collector before the sale."

Application of proceeds of farmed estate.

When an estate has been farmed under the provisions of sec. 24, the proceeds of such farm shall be paid to

[1] Provided the reasons are stated in writing, the purchaser would not be bound to consider whether they are sufficient or to enquire into the facts upon which such reasons are based; see cases *ante*, p. 157, note 4.

[2] This applies to estates not brought under the superintendence of the Court. See *ante*, p. 356, note 2. *Cf.* Mad. Reg. X of 1831, sec. 2, *post*, chap. xxxv.

the Collector, and the Collector, after deducting the amount of the claims of the Government for revenue and other public demands shall either pay the proceeds to the person authorised to receive them for the proprietor, or if the proprietor is still a minor shall invest them in the way provided for the investment of the surplus income of the estates of minor wards of the Court of Wards.[1]

Penalty for neglecting to furnish accounts, &c.

Any farmer holding or having held lands under the Court of Wards, who, upon notice served upon him to that effect at any time during the currency of the lease or within six months after the expiry of the lease under which such lands were held or after he has relinquished such lands, omits or refuses to furnish accounts or produce documents or papers required under such notice, and shall not show sufficient cause for such omission or refusal, shall be liable to such fine as the Collector may think fit to impose, not exceeding one hundred rupees, for such omission, and the Collector may impose such further daily fine[2] as he may think proper, not exceeding twenty rupees for each day during which such farmer shall omit to furnish the accounts, documents or papers required after a date to be fixed by the Collector in a notice warning the farmer that such further daily fine will be imposed.

Service of notice.

Such notice shall be served by tendering to the person to whom it may be directed a copy thereof, attested by the Collector, or by delivering such copy at the usual place of abode of such person or to some adult male member of his family ; or in case it cannot be so served, by posting such copy upon some conspicuous part of the usual or last-known place of abode of such person, and in case such notice cannot be served in any of such ways it shall be served in such a way as the Collector issuing the notice may direct, and the date fixed by such notice shall not be less than fifteen days after service thereof.

The Collector may proceed from time to time to levy any amount which has become due in respect of such fine

[1] Act IX (B.C.) of 1879, sec. 26. See sec. 50, *ante*, pp. 343, 344.

[2] See *ante*, p. 91, note 5.

notwithstanding that an appeal against the order imposing such fine may be pending. Provided that whenever the amount levied under such order shall have exceeded five hundred rupees, the Collector shall report the case specially to the Commissioner of the Division, and no further levy in respect of such fine shall be made otherwise than by the authority of the Commissioner.[1]

Levy of fine.

Attachment by Civil Court.

There is nothing to prevent property under the superintendence of the Court of Wards from being attached by orders of a Civil Court.[2] Under the old law[3] the payment of the charges of management, and of Government revenue had priority over an attachment by a Civil Court. Under the present law[4] Government revenue alone forms a charge, and no priority is given to undeducted charges of management.

Disabilities of ward.

A ward of the Court of Wards cannot create without the sanction of the Court, any charge upon, or interest in his property or any part thereof[5] or assign over or charge any allowance received by him from the Court.[6] This provision is in the main, if not entirely, intended to meet the cases of wards other than minors, as in addition to the disabilities contained in the Court of Wards Act, 1879, minor wards of the Court of Wards are subject to the same disabilities as other minors.

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[1] Act III (B.C.) of 1881, sec. 9. The fine is to be levied in accordance with the Criminal Procedure Code (Act X of 1882, secs. 386, 387, 389); see Act V (B.C.) of 1867, sec. 4. See *ante*, p. 325, note 5.

[2] By Act IV of 1892, sec. 13, a ward's property which has been under the charge of the Court of Wards cannot, except with the leave of that Court, be taken in execution of a decree made in respect of any contract entered into by the ward without the leave of the Court, while his property was under such charge. This provision was probably intended to meet the case of contracts by adult wards only. See *ante*, p. 12.

[3] Act IV (B.C.) of 1870, sec. 47.

[4] Act IX (B.C.) of 1879, secs. 23 and 24, *ante*, pp. 357, 358.

[5] Act IX (B.C.) of 1879, sec. 60. See *Dhunput Singh* v. *Shoobkedr Kumari*, I. L. R., 8 Calc., 620; s.c., *Dhunput Singh* v. *Court of Wards*, 11 C. L. R., 285; *Balkrishna* v. *Mazuma* I. L. R., 5 All., 142; L. R., 9 I. A., 182; *Mohummud Zahoor Ali Khan* v. *Rutta Koer*, 11 Moo. I. A., 468; *Collector of Benares* v. *Sheopersad*, I. L. R., 5 All., 487, see *ante*, p. 12.

[6] Act IV of 1892, sec. 12.

Adoption by ward invalid without consent of Lieutenant-Governor.

No adoption by any ward, and no written or verbal permission to adopt given by any ward, is valid without the consent of the Lieutenant-Governor, obtained either previously or subsequently to such adoption, or to the giving of such permission, on application made to him through the Court.[1] Even with such consent the ward cannot adopt or give permission to adopt unless he has arrived at years of discretion.[2]

Procedure when Court's jurisdiction ceases.

Whenever the Court of Wards has determined to release the property of a ward from its charge, it must make an order that the jurisdiction of the Court over such property shall cease on a date not more than sixty and not less than fifteen days from the date of such order; and copies of such order shall be published as the Court may direct.[3]

Publication of order of release.

An order[4] of release shall be sent by the managing Commissioner to each Commissioner and Collector in charge of any of the immoveable property of the ward, and every such Commissioner and Collector must notify the intended cessation of the charge by a notice put up in his own office and in a conspicuous place in the estate.[5]

Restoration of papers, etc., to late ward.

When the estate is released, the Collector shall prepare a list in duplicate of the papers to be delivered and of all moveable or immoveable property which may be in the custody or charge of the Collector or manager, and such papers and moveable property shall be given up to the late ward or his successor with one of the two lists, a receipt being affixed to the other, signed by him or his authorised agent. Only such papers of the manager's English records or correspondence relating to the estate as the Collector thinks proper to be delivered, should be made over to the late ward.[6]

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[1] Act IX (B.C.) of 1879, sec. 61.

[2] See *Rajendro Narain Lahoree* v. *Saroda Soondaree*, 15 W. R. C. R., 548; and *Jumoona* v. *Bamasoondari*, I. L. R., 1 Calc., 289; L. R., 3 I. A., 72; *ante*, p. 30.

[3] Act IX (B. C.) of 1879, sec. 65. The words "determined to release" seem to shew that this is intended to apply only to cases where the Court of Wards can exercise an option as to the release of the property (see sec. 9 (*c*), *ante*, p. 323), and not to cases where it is bound to give up charge (see sec. 8, *ante*, p. 323). As a matter of practice, however, notice is given in all cases.

[4] Appendix B to Court of Wards Rules.

[5] Court of Wards Rules, sec. VII, rule 1.

[6] Court of Wards Rules, sec. VII, rule 2.

Report and return of results of management.

As soon as convenient after the release of an estate the Collector shall submit a report with a return[1] showing the results of the management of the property from the time charge was assumed of it till it was released.

This report, after examination and review, is to be forwarded by the Commissioner to the Court. The late ward or his successor may, on application, obtain a copy of this report and return.[2]

Recovery of expenses incurred on account of property in charge of Court.

Any expense incurred by the Court on account of property under its charge may, after the release of such property, be recovered as a demand under Bengal Act VII of 1880, or any other Act at the time being in force for the recovery of public demands[3] from any person into whose possession such property or any part thereof may have passed immediately after the release by the Court of such property: Provided that the sum so recovered from any such person shall not be greater than the value of any such property which so passed into the possession of such person.[4]

The following provisions of the Court of Wards Act[5] apply to proceedings under that Act:—

Powers of Collector in making enquiries.

"Section 66. A Collector making any enquiry under this Act may exercise any power conferred by the Code of Civil Procedure on a Civil Court for the trial of suits.[6]

Appeals.

"Section 67. An appeal shall lie from every order of a Collector under this Act to the Commissioner of the division, and from every order of a Commissioner under this Act to the Court.[7]

Control of Court.

"Section 68. All orders or proceedings of the Commissioner and of the Collector under this Act shall be

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[1] See Form XXXI in Appendix to Court of Wards Rules.

[2] Court of Wards Rules, sec. VII, rule 3.

[3] *Ante*, p. 340, note 8.

[4] Act III (B.C.) of 1881, sec. 11. This refers both to cases where the Court has, and to those where it has not, a discretion to release the property.

[5] Act IX (B. C.) of 1879.

[6] See *ante*, p. 324, note 6.

[7] In the case of orders under sec. 57 the appeal lies to the Commissioner to whom the Collector passing the order appealed against is ordinarily subordinate; Court of Wards Rules, sec. II, rule 5.

subject to the supervision and control of the Court, and the Court may, if it thinks fit, revise, modify, or reverse any such order or proceeding whether an appeal is presented against such order or proceeding or otherwise. [1] "

The Court of Wards may make rules [2] consistent with the Act— Power of Court to make rules.

(*a*) defining the powers of Commissioners and Collectors respectively when the property of a ward is situated in two or more districts or in two or more divisions; [3]

(*b*) prescribing what reports shall be made from time to time by Collectors and Commissioners on the condition of the ward and his property; [4]

(*c*) prescribing the periods at which, and the mode in which, accounts shall be submitted by managers and guardians respectively, and the mode in which such accounts shall be audited ; [5]

(*d*) regulating the custody of securities and title deeds belonging to the estate or property of a ward ; [6]

(*e*) regulating the procedure in appeals from orders of Collectors and Commissioners respectively under the Act ; [7]

(*f*) prescribing the procedure to be observed when a property ceases to be under the charge of the Court ; [8]

(*g*) and generally for the better fulfilment of the purposes of the Act. [9]

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[1] The appeal must be accompanied by a copy of the order appealed against and must be prepared within one month of the date of the order excluding the time taken to procure a copy of the order ; Court of Wards Rules, sec. VI, rule 1. Appeals to a Commissioner may be presented to the Collector and appeals to the Board may be presented to the Commissioner ; *ibid* rule 2. As to the procedure in case of appeals, see Court of Wards Rules, sec. VI, rule 3.

[2] Act IX (B.C.) of 1879, sec. 70.

[3] Court of Wards Rules, sec. II.

[4] Court of Wards Rules, sec. III.

[5] Court of Wards Rules, sec. IV.

[6] Court of Wards Rules, sec. V.

[7] Court of Wards Rules, sec. VI.

[8] Court of Wards Rules, sec. VII.

[9] Court of Wards Rules, sec. VIII.

The Court may from time to time alter, add to, or repeal such rules.[1]

Suits by and against wards of Courts of Wards.

The provisions of the Court of Wards, Act, 1879[2] with reference to suits brought by and against wards of the Court of Wards are to be found in Chapter XXXVI, *post*.

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[1] Act IX (B. C.) of 1879, sec. 70

[2] Act IX (B.C.) of 1879.

CHAPTER XXXIV.

COURT OF WARDS, NORTH-WESTERN PROVINCES.

THE law as to the Court of Wards of the North-Western Provinces is to be found in Act XIX of 1873, which repealed Bengal Regulations LII of 1803, VIII of 1805, VI of 1822, and I of 1829.

Constitution of Court.

The Board of Revenue of the North-Western Provinces has the powers of a Court of Wards for the superintendence of the persons and property[1] of all minor[2] proprietors of mahals or part[3] of mahals.[4]

Power to decline superintendence and to release person or property.

The Court of Wards may, in its discretion, assume or refrain from assuming the superintendence of the person or property of a minor, and may at any time release such person or property from its superintendence.[5]

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[1] All the property; *ante*, p. 322, note 3.

[2] As "minor" is defined in sec. 3(12) of Act XIX of 1873 as "a person who has not completed his age of 18 years" it may be a question whether the Court of Wards has any power to retain charge of an estate after the proprietor has attained the age of eighteen years (see *ante*, p. 11); but the Indian Majority Act (IX of 1875, sec. 3, *ante*, p. 8) has apparently extended the powers of all Courts of Wards so as to enable them to retain charge until the attainment of the age of 21 years.

[3] This would apparently not include an undivided share.

[4] Act XIX of 1873, secs. 193 and 194. "Mahal" is defined by sec. 3 (1) of that Act as amended by Act VIII of 1879, sec. 2, as meaning—

(*a*) any local area held under a separate engagement for the payment of the land revenue, and for which a separate record of rights has been framed;

(*b*) any local area of which the revenue has been assigned or redeemed, and for which a separate record of rights has been framed; and

(*c*) for such purposes as the Local Government may from time to time determine, any grant of land made heretofore or hereafter under the waste land rules for the time being in force.

[5] Act XIX of 1873, sec. 195.

If the person or property of a minor has been placed under the charge of the Collector,[1] or under the superintendence of the Court of Wards, by any Civil Court, it cannot be released without the concurrence of such Court.[2]

Collector to report minority of proprietors.

The Collector of the district must ascertain and report to the Board of Revenue as Court of Wards through the Commissioner from time to time what proprietors are minors.[3]

As soon as it comes to his notice the Collector should report any case in which he thinks management should be assumed,[4] but should not submit proposals until he has ascertained that the management of the estate cannot be properly and safely arranged for in any other way.[5]

Proposals.

If there are sufficient grounds he should in his report note how he proposes to arrange for the management of the estate,[6] whether there are relatives of the minor,[7] and whether there is any person who by relationship, or by the wish of the person from whom he inherits, is entitled to assume care of his person, and if not what arrangements he proposes to make.[8]

Education.

If the minor is a male and of sufficient age to commence his education, the Collector should report whether he considers his circumstances are such as to render it advisable to send him to the Wards' Institute at Agra,[9] and the amount which he proposes to allow for his expenses. He should at the same time state if sufficient means of education are available at any of the schools near the minor's residence or at the head-quarters of the district, and what arrangements can be made for his board and care if he is sent to any of these places instead of to the Institute.[10]

Should the Collector consider that the minor, from being of a week and sickly constitution, or from other causes, is unfit to go to school, he should report the fact to the Board and state what

[1] *i.e.*, the chief officer in charge of the revenue-administration of a district; Act XIX of 1873, sec. 3(2).

[2] Act XIX of 1873, sec. 195.

[3] Act XIX of 1873, sec. 196.

[4] General Rules of Court of Wards, rule 3.

[5] General Rules, rule 4.

[6] He should also submit schedules of the establishment required showing the salaries and work of the different persons proposed and their qualifications; General Rules, rule 12.

[7] General Rules, rule 5.

[8] General Rules, rule 13.

[9] See Rules of Board of Revenue N.-W. P. regarding the Wards Institute at Agra.

[10] General Rules, rule 13.

amount the estate can afford to pay for a private tutor; and on receiving their sanction, he should engage a fit person.[1]

If, when the estate of the minor is taken under management, the ward is not old enough to commence his education, this report should be submitted when he attains a sufficient age.[2]

In selecting the institution to which wards in their districts are to be sent, district officers should consult the Inspector of Schools of the Division, and the institution selected should, if possible, be one which can be easily visited by an Inspector at least once a year.[3]

Financial condition of estate.

The Collector's report must be accompanied by two statements showing the extent and financial condition of the estate sufficiently accurately to give a correct idea thereof.[4]

Duty of Commissioner.

The Commissioner must forward the Collector's report to the Board with such remarks as he may consider necessary, and with a clear expression of his opinion, both as to the advisability of assuming management, and also as to the sufficiency and fitness of the supervising agency proposed.[5]

Estate situat in different districts.

If the larger portion of the property of any proprietor whom the Collector considers to be a minor, and whose estate he considers should be brought under the care of the Court of Wards, is situate in another district, he should communicate with the Collector of that district, in order that he may take the requisite action, and he should furnish him with full information as to the portion of the estate lying within his own jurisdiction.

The latter officer will then report to the Commissioner, embodying the information so received in his report and expressing his opinion as to whether the estate should be taken under management or not.[6]

The Commissioner will then report to the Board.[7]

Order on report.

The Court of Wards shall, on receipt of the report of the Collector, make such order as may seem to it expedient.[8]

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[1] Communicating, if necessary, with the Director of Public Instruction on the subject; General Rules, rule 14.

[2] General Rules, rule 15.

[3] The education of wards is under the joint supervision of the district authorities and the Inspector of the Education Department; see rules of the Board of Revenue N.W.P. Court of Wards, rule 10.

[4] General Rules, rule 5; see forms XVII and XVIII. In the report the Collector should specially note if he proposes to make over the duty to any of his covenanted subordinates.

[5] General Rules, rule 6.

[6] General Rules, rule 9.

[7] General Rules, rules 6 and 9.

[8] Act XIX of 1873, sec. 196,

Order without report.

The Court of Wards or the Local Government may make an order without any report from the Collector.[1]

Dispute as to Court of Wards' right to superintendence.

If the right of the Court of Wards to assume or retain the superintendence of the person or property is disputed by the proprietor, who is alleged to be a minor, or by some person on his behalf, the case must be reported to the Local Government whose orders thereon are final.[2]

Assumption of charge.

When assuming charge of an estate the District Officer must have a regular enquiry made as to the ward's age from his or her near relatives and others likely to be acquainted with the facts.[3]

Expenses and education.

The Court of Wards may from time to time determine what sums shall be allowed in respect of the expenses of the minor, and direct where the minor, if a male, shall reside for the purpose of education or otherwise.[4]

Powers of Court of Wards over property.

The Court of Wards can give such leases and farms of the whole or parts of the property under its charge, and can mortgage or sell the whole or any part of such property, and do all such other acts as it may judge to be most for the benefit of the property and the advantage of the minor.[5]

Estate partly in N.-W. P. and partly in Oudh.

When an estate is situate partly in the North-Western Provinces and partly in Oudh, the Court of Wards in whose jurisdiction the proprietor resides will be his guardian, when a guardian is necessary, and be responsible for the general management of the estate, for the liquidation of the debts, and the education of the proprietor.

The Court of Wards of the other province will manage generally the estate within its jurisdiction, conduct all litigation connected with it and hand over to the other Court of Wards the net surplus, after allowing for a working balance.

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[1] Act XIX of 1873, sec. 197.

[2] Act XIX of 1873, sec. 198.

[3] General Rules, rule 16. The statement so made should be recorded and signed by persons making them, and the District Officer should record a distinct finding as to the day of birth according to both the Native and Christian eras.

[4] Act XIX of 1873, sec. 200, as amended by Act VIII of 1879, sec. 21.

[5] Act XIX of 1873, sec. 203, as amended by Act VIII of 1879, sec. 22. All instruments by which immoveable property exceeding Rs. 200 in value is mortgaged or sold to, or by, the Court of Wards, must be submitted for the Board's approval before being executed; Court of Wards Rules, rule 3, which see also for forms of deeds of sale and mortgage.

The Court managing the general business of the estate should be supplied by the other Court of Wards with a copy of the annual accounts furnished by it to its revenue controlling authority.

The accounts furnished by the Court of Wards which is not in charge of the ward himself should be in the form ordinarily used by the Court furnishing the accounts.[1]

Exercise of powers through others.

The Court of Wards may exercise its powers through the Collector of the district in which any part of the property of the minor is situate, or through any other person whom it may appoint for such purpose.[2]

Nomination of patwari.

When an estate is under the Court of Wards, the Collector of the district, or the Assistant Collector is deemed to be the proprietor for the purpose of nominating a patwari.[3]

Civil Courts not to interfere with Court of Wards.

No Civil Court can exercise jurisdiction in any matter falling within the jurisdiction of the Court of Wards, or on which the jurisdiction of the Court is actively exercised, except for the purpose of recovering property committed by that Court to the charge of the Collector of the district.[4]

Appointment, removal and control of managers and guardians.

The Court of Wards may appoint a manager of the property and a guardian of the person of the minor, and may remove and control such manager and guardian.[5]

Testamentary guardians.

A proprietor may appoint guardians for his minor heirs, by will executed and attested in manner required by the Indian Succession Act,[6] but such appointment is not valid till confirmed by the Court of Wards.[7]

Special Managers.

In certain districts special managers are appointed to take charge of all estates under the management of the Court of Wards, their salaries being rateably defrayed by all the estates under their charge in strict proportion to

[1] Court of Wards Rules, rule 9. The net surplus received may be shown in a lump sum on the receipt side of the accounts for the entire estate.

[2] Act XIX of 1873, sec. 204.

[3] Act XIX of 1873, sec. 26.

[4] Act XIX of 1873, sec. 241 (*k*).

[5] Act XIX of 1873, sec. 199.

[6] Act X of 1865, sec. 50.

[7] Act XIX of 1873, sec. 199. The appointment must be reported by the Collector of the district, through the Commissioner, to the Court for confirmation, and in so doing the Collector shall state his opinion of the fitness or otherwise of the guardian appointed; General Rules, rule 11.

the gross income of each estate. They are responsible to the Collector for the collection of rents and for other work entrusted to them. They can sign payment vouchers subject to the limit placed on their powers by the Collector.[1]

Powers of manager.

The manager may collect the rents of the land entrusted to him,[2] as well as all other money due to the minor,

Leases and farms.

and may grant receipts therefor. He may, subject to the control of the Court, grant or renew such leases and farms, not being for a longer period than five years, as may be necessary for the good management of the property.[3]

Duties of manager.

The manager must manage the property committed to him diligently and faithfully for the benefit of the minor and must in every respect act to the best of his judgment for the minor's interest as if the property were his own.[4]

Proceedings in Revenue Courts.

The manager may, subject to the control of the Collector, institute, defend, compromise or otherwise deal with suits, applications or other proceedings in Revenue Courts relating to the property entrusted to him.[5]

Suits in Civil Courts.

As to suits by and against wards of the North-Western Provinces Court of Wards see *post*, Chapter XXXVI.

Every manager must[6]—

Security.

(*a*) give such security, as the Court of Wards thinks fit, duly to account for what he shall receive in respect

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[1] See General Rules rules, 18 to 30.

[2] He can distrain for rent under secs. 56 and 57 of the N.-W. P. Rent Act (XII of 1881), see sec. 59 of that Act.

[3] Act XIX of 1873, sec. 201. See Rule 49 of General Rules of Court of Wards, N.-W. P., which enjoins the Collector or special manager not to give leases to speculators but to consider the future prosperity of the estate. The deeds of lease must provide that the lessee shall make no alteration in the term of the tenant's holding without the written sanction of the Collector. No application for enhancement shall be filed whether by the lessee or by the special manager without the written sanction of the Collector. Rule 50 approves the acquisition of occupancy rights by tenants who are able and willing to pay a fair rent, and who have given no positive cause for disapproval.

[4] Act XIX of 1873, sec. 202; cf. Act VIII of 1890, sec. 27, *ante*, p. 134. As to the duty of the manager to pay income-tax, see Act II of 1886, sec. 22, *ante*, p. 138.

[5] Act VIII of 1879, sec. 24.

[6] Act XIX of 1873, sec. 206.

of the rents and profits of the property for which he is appointed ;

(*b*) pass his accounts at such periods, and in such form as the Court of Wards directs ; Accounts.

(*c*) pay the balance due from him thereon ; Payment of balance.

(*d*) apply for the sanction of the Court of Wards to any act which may involve the property in expense not previously sanctioned by such Court ; Sanction of Court for expenses.

(*e*) be entitled to such allowance as the Court of Wards thinks fit for his care and pains in the execution of his duties ; Salary.

(*f*) be responsible for any loss occasioned to the property by his wilful default or gross negligence. Negligence.

The Collector or manager must, before the 1st November, submit annual statements of actual expenditure for the revenue year from the 1st October to the 30th September to the Board through the Commissioner in the forms provided by the rules.[1] Annual reports and accounts.

The annual report should give an account of the management during the past year with a full explanation of any considerable differences between the estimates, and the actuals for the year, and should shew the condition of the estate and the system of management, the improvement effected, whether any scheme of systematic improvement is being carried out, the progress made in the liquidation of debt (if any), investments, litigation and all other points of interest.[2]

It should also contain information on the following matters[3]—

(*a*) increase of rental resulting from construction of wells ;

(*b*) increase of rental resulting from other improvements, and explanation of improvements, which have not resulted in increase of rental ;

(*c*) verification of securities of managers, sazzawals, &c. ;

(*d*) character of lessees in cases where villages have been leased or farmed ;

(*e*) ages of wards ;

(*f*) occurrence of deaths or births in the family of ward ;

(*g*) education of ward.[4]

If an estate is situate partly in one district, and partly in others, a brief report and statements of account should be furnished by Estate in different districts.

[1] See General Rules of Court of Wards, rule 31.

[2] General Rules, rule 33.

[3] General Rules, rule 34.

[4] A certificate from an Inspector or Deputy Inspector of Schools should be furnished where possible ; *ibid.*

the other districts to the Collector of that in which the principal part and head quarters of the estate lie, who should incorporate them in his report.[1]

Budget

The Collector or manager must also send to the Commissioner by the 15th of June in each year a budget estimate of the estate in the forms provided by the rules.[2] The Collector is responsible for any unsanctioned expenditure which the Board do not approve, and which might have been prevented by timely submission of the budget estimate for their sanction.[3]

Initiation of ward into business of estate.

During the last twelve months of the Court's administration the Collector or special manager should endeavour to interest the ward in the method of management, as also to train or encourage him, as far as possible, to pursue similar methods, and to continue satisfactory business habits on his own assumption of charge.[4]

Consolidation of estate.

Opportunities should be taken, whenever possible, of consolidating scattered estates—

(*a*) by selling small fractional shares in outlying villages, etc.,

(*b*) by purchasing the rights of persons holding small shares in Court of Wards villages.[5]

Investment of savings.

Savings should only be invested in Government securities, when they cannot be expended on improving the estate itself.[6]

Securities.

Securities must be registered in the names of both members of the Board of Revenue.[7]

Disability of disqualified proprietors.

Act VIII of 1879, sec. 24, provides that persons whose property is under the superintendence of the Court of Wards shall not be competent to create, without the sanction of the Court, any charge upon, or interest in, such property or any part thereof, and that no such property shall be liable to be taken in execution of a decree made in respect of any contract entered into by any such person while his property is under such superintendence.[8]

Exemption from sale for arrears of revenue.

Land under the charge of the Court of Wards is not liable to annulment of settlement for arrears of

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[1] General Rules of Court of Wards, rule 35.

[2] General Rules, rules 41 to 47, 52, forms Nos. XIII to XVI.

[3] General Rules, rule 43.

[4] General Rules, rule 51.

[5] General Rules, rule 53.

[6] General Rules, rule 54.

[7] General Rules, rule 55.

[8] So far as minors are concerned, this provision seems to be unnecessary, see *ante*, p. 360.

revenue which have accrued due while it has been under such charge.[1] Land cannot be sold for any arrear which may have accrued while it was under the charge of the Court of Wards, or was so circumstanced that the Court of Wards might have exercised jurisdiction over it.[2]

Making over of records on release of estate.

The following records may be made over to the proprietor of an estate released from the control of the Court of Wards :[3]—

1. Correspondence between the Collector, as representing the Court of Wards, and the vendor regarding any purchase of property made on behalf of the estate together with all documents affecting the purchase.

2. Correspondence between the Collector, as representing the Court of Wards, and the persons who have claims against, or are indebted to, the estate, regarding such claims and all documents appertaining thereto.

3. All correspondence between the Collector and lessees regarding leases granted by Collectors as representing the Court of Wards.

4. The papers regarding all civil and revenue suits and all criminal cases in which the Court of Wards has been a party, provided that (ordinarily) an opinion given by the Legal Remembrancer or Government Pleader need not be given. Copy of any such opinion shall not be made over without a special order of the Collector to that effect.

5. *Sattas* and all other documents entered into between the Court of Wards and cultivators of indigo and similar documents relating to the manufacture of saltpetre.

6. The general accounts of the estate during the time that it was under management with all vouchers and receipts.

7. All bonds and other documents securing repayment of money to the estate.

The Collector may, with the sanction of the Board, refuse to give the proprietor of an estate any of the above records, and he may also, if he think fit, grant on the application of the proprietor any records not mentioned above. Provided that without the express sanction of the Board no records of the following nature shall be given up ;—

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[1] Beng. Reg. XXVII of 1795, sec. 5 (5) ; Act XIX of 1873, sec. 158.

[2] Act XIX of 1873, sec. 166, prov. (*a*). cf. Act IX (B.C.) of 1879, secs. 23 *et seq.* (*ante*, pp. 356 to 359) and Mad. Reg. V. of 1804, sec. 14, and X of 1831, sec. 2 (*post*, chap. XXXV).

[3] Rules of Board of Revenue, N.-W. P. Court of Wards, rule 13.

1. Correspondence between the Collector or manager and superior authority and reports made by the Collector or manager.

2. Correspondence with the Legal Remembrancer.

3. Correspondence reflecting in any way on the conduct of Government servants or employés of the Court of Wards.

4. Correspondence relating to allowances made to, or claims preferred by, members of the family of the proprietor of the estate.

CHAPTER XXXV.

Court of Wards, Madras.

The Court of Wards in the Madras Presidency was created by Madras Regulation, V of 1804, which is still in force. By that Regulation[1] the Madras Board of Revenue was constituted the Court of Wards for the Presidency. Constitution of Court.

The Court of Wards has power to select and appoint proper persons[2] to the custody and management of property devolving upon minor heirs,[3] to the education of minors, taking due means to secure and to render the persons so selected and appointed responsible for the proper execution of the trust reposed in them.[4] Powers of Court of Wards.

The power of the Court does not extend in any case to the property of persons not paying directly rent or revenue to Government,[5] but should they pay such rent or revenue directly in respect of any property the powers of the Court will extend over the whole of their property.[6]

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[1] Section 2.

[2] *Post*, p. 380.

[3] Except there be property devolving on a minor by way of inheritance the Court of Wards would have no jurisdiction. Sec. 4 of the Regulation provides that the duration of minority shall without exception continue until the completion of the eighteenth year. The Indian Majority Act (sec. 3, *ante*, p. 8) has extended the age of majority of wards brought under the superintendence of Courts of Wards before the end of their eighteenth year to the end of the twenty-first year. It does not permit the Court to take under its superintendence the property of persons who have completed their eighteenth year; cf. Act IX (B. C.) of 1879, sec. 3, *ante*, p. 11.

[4] Mad. Reg. V of 1804, sec. 2. The Court cannot take or retain charge of an estate belonging to an undivided Hindu family unless all the members are subject to its superintendence; *Krishna* v. *Mekamperuma*, I. L. R.,10 Mad., 44; *cf.* Act IX (B.C.) of 1879, sec. 11, as amended by Act IV of 1892, sec. 7, *ante*, pp. 323, 324.

[5] Mad. Reg. V of 1804, sec. 2.

[6] See *ante*, p. 322, note 3.

Assent of Governor in Council required.

The Court cannot exercise its power until each separate case, together with all the circumstances connected, shall have been submitted to the Governor in Council, and until the authority of the Governor in Council shall have been signified in writing for the exercise of its powers by the Court of Wards.[1]

Court of Wards may assume charge at any time.

The Court of Wards may assume charge of an estate at any time during the minority[2] of the proprietor, notwithstanding it may have originally refrained from interfering.[3]

Mode of bringing property under Court of Wards.

Where property charged with the direct payment of rent or revenue to Government devolves by inheritance upon a minor, the Collector[4] must transmit, without delay to the Court of Wards, a written report (founded on personal enquiry or on the testimony of credible persons according to the nature of the case) describing all the circumstances of the case.[5] Such report must be accompanied by a description of the condition of the minor, the value of the property devolving upon him, and the name of the person most proper in the judgment of the Collector to be appointed his guardian, provided that guardians may not have been appointed for him by the will of a person authorized to make the appointment.[6]

Court to state case to Governor in Council.

On receipt of the report the Court of Wards must state the case, with their opinion and judgment to the Governor in Council.[7]

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[1] Mad. Reg. V of 1804, sec. 2.

[2] *i.e.*, before the minor attains eighteen years of age, *ante*, p. 8.

[3] Mad. Reg. X of 1831, sec. 2, cl. 2.

[4] *i.e.*, the Collector of the district in which any portion of such property may be situate.

[5] Mad. Reg. V of 1804, sec. 3. The report should note especially the age and sex of the minor, his or her relationship to the deceased proprietor, the apparent financial condition of the estate, the names of the other members of the family, the wishes of the latter, and the manner in which their interests are involved in the matter; Board's Standing Orders, chap. xvi, 221. The same order grants to Collectors a discretionary authority to abstain from submitting proposals for taking charge in the case of small estates other than those held under zemindary tenure, but the Regulation makes no exception.

[6] Mad. Reg. V of 1804, sec. 18; see *ante*, pp. 70 to 75. As to the recognition of testamentary guardians by the Legislature; see *ante*, pp. 71, 336, note 4.

[7] Mad. Reg. V of 1804, sec. 3.

Proceedings of Court to be founded on reports of Collectors.

The proceedings of the Court of Wards must, in the first instance be founded on the Collector's report. Collectors making reports on insufficient authority are liable to be proceeded against [1] in the Civil Courts, either at the instance of the parties injured or of the Court of Wards, and if undue reports are made through negligence or for malicious purposes they are liable to pay damages and costs.[2]

Liability of Collectors making undue reports.

Procedure where minor disputes grounds of report.

Where a minor, or a person described as such, is deprived of the possession or management of his property, and disputes the grounds on which the Collector's report has been framed, the following is the procedure to be observed. The case of the complainant with the evidence and documents in support thereof must be presented to the District Judge. The District Judge must transmit a copy of such case, together with copies of the evidence, and documents in support thereof to the High Court, which shall immediately issue a precept to the District Judge to bring the complainant before his Court. The District Judge is then to make ocular observation in open Court of the complainant, and to take in writing the oaths of not less than three credible persons well acquainted with the complainant, setting forth their knowledge and belief of the facts and circumstances connected with the case. The District Judge is then to transmit to the High Court the whole proceedings together with his opinion on the case. The decision of the High Court is final, and a certificate of its decision must be furnished by the High Court to the Governor in Council for the guidance of the Court of Wards. Females who by the custom of the country do not appear in public cannot be required to appear in open Court.[3]

Duties of Collector.

Collectors must manage the estates of minors under the Court of Wards in the manner prescribed by law, or

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[1] Personally. Their successors would not be liable; see *Anundnath Ruee* v. *Collector of Rajshahye*, Ben. S. D. A., 1850, p. 301.

[2] Mad. Reg. V of 1804, sec. 6.

[3] Mad. Reg. V of 1804, sec. 7.

agreeably to such special orders as they may receive in particular cases from the Court of Wards.[1]

As soon as Government has committed an estate to the care of the Court, the Collector will submit his nomination of a guardian and manager; together with proposals for management, comparing expenditure briefly with income. As soon as practicable thereafter the following statements will be submitted:—

(1) A list of debts due to and by the ward, showing how they accrued, what interest they bear, and within what time or how they will be recovered or paid. This list must be accompanied by a tabular statement showing the financial condition of the estate according to the latest information.

(2) A brief memoir on the history of the estate, its extent, position, geographical features, population and villages.

(3) A statement with a map annexed showing the existing lines of internal communication, the roads, bridges, &c., which must be made in order to complete the system, the annual expenditure required for new roads and bridges, &c.

(4) A similar statement with regard to buildings and miscellaneous works of public utility.

(5) A similar statement with regard to works of irrigation, showing the amount of revenue dependent on each existing work.

(6) A memorandum showing the area under cultivation, the nature and conditions of the culture, the particulars of the settlement or settlements in force, the tenures of the cultivators and their conditions compared with those in villages belonging to Government in the neighbourhood.

(7) The conditions of forests and the system of conservancy required.[2]

Inam alienations.

Immediately estates are taken charge of, the Collectors should make careful enquiry with regard to the inams granted subsequent

[1] Mad. Reg. II of 1803, sec. 25. Collectors, as agents to the Court of Wards, have the same powers in regard to questions between tenant and landlord, as the ward would have, if a major; Board's Standing Orders, chap. xvi, 210.

[2] Board's Standing Orders, chap. XVI, 221. If it is necessary that orders should be obtained on any particular points before the statements are prepared in full, Collectors may report, as far as they are able to do so reserving the rest until information is available; but the several subjects should be noticed in this order and with reference to these numbers, the points not reported on being shown as blank in the first return. These statements are desired to meet the circumstances of large estates, and many parts of them will be blank when the estates are small; they must be submitted, however, in every case. Additional representations may be made subsequently; *ibid.*

to the Permanent Settlement, which may exist in estates taken charge of, and submit a special report accompanied by statements showing the alienations in which resumption is barred, and those in which it is not barred within a year after the assumption of the charge.[1]

In cases where the inams are continued an addition should be made to the quit rent so as to preserve the proprietor's title, and a *puttah* should be issued shewing that a grant is made by favour and not of right, and that it may be set aside when the ward attains his majority. In cases where the resumption of subsequent inams may not be considered expedient or the resumption is barred by the law of limitation, steps should be taken without delay to apportion the *peshkash* on the alienated portions under Madras Act I of 1876.[2]

Budget.

A budget must be submitted annually on the 10th May showing the expected receipts and expenditure of the estate during the coming *fasli* year. In the covering letter the question as to what sum should be expended on public works must be fully discussed.[3]

A demand collection and balance statement must also be submitted quarterly.[4]

Disbursements for ceremonies.

Collectors may make disbursements for religious and family ceremonies, without special sanction on each occasion, on the following conditions :—

1. That the Court has already once sanctioned expenditure on the same object.

2. That the proposed expenditure does not differ by more than 10 per cent. from the expenditure previously sanctioned by the Court. Expenditure in excess of the sanctioned scale should, however, only be sanctioned under exceptional circumstances, which should be explained in the account current in which the charge appears.

3. That an allotment to meet the expenditure has been made in the budget.

4. That no material alteration has taken place in the circumstances of the ward's estate or of the person on whose

[1] For forms see Appendix to chap. xvi of Board's Standing Orders.

[2] Board's Standing Orders, chap. xvi, 216. Resort to Act I (M. C.) of 1876 can be had only in the case of absolute alienations. In the case of lands leased free of rent or on favourable rent, subdivision can be compelled only in cases where the lessee has agreed not only to pay *kattubadi* to the zemindar, but also to pay the proportionate *peshkash* on the land leased ; *ibid.*

[3] Board's Standing Orders, chap. xvi, 221, 6, which also see with regard to proposals for improvements of importance.

[4] Board's Standing Orders, chap. xvi, 221, 8.

behalf the expenditure is sanctioned since the Court first sanctioned it[1]

Public works.

Except with regard to works executed by the Public Works Department, Collectors should apply for and obtain the previous sanction of the Court for all original public works costing over Rs. 100 each, and for all repairs costing over Rs. 250 each. Up to that amount they can order the work if the cost has been provided for in the budget. Emergent repairs can be executed under all circumstances in anticipation of sanction.[2]

Custody of valuable articles.

Sealed boxes containing articles of value belonging to estates under management and not required for the use of the wards should be deposited in the Government Treasury subject to the conditions specified in the note to Rule 2, Chapter I, of the Civil Account Code. The keys of such boxes should be with the Collectors concerned.[3]

Appointment of managers.

On the property being committed to the care of the Court of Wards by the Governor in Council, the Court has, on the recommendation of the Collector, to appoint a manager of the property.[4] Should the Court decline to accept the Collector's recommendation, the case must be decided by the Governor in Council.[5] Guardians of minors cannot be appointed managers.[6]

Security to be given by manager.

The manager must give security for his personal appearance during the course of his management, and must execute a bond in the prescribed form.[7]

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[1] Board's Standing Orders, chap. xvi, 221. Collectors should enter in their accounts current against expenditure incurred by them under this provision a reference to the Court's proceedings first sanctioning expenditure on the same object; *ibid.*

[2] Board's Standing Orders chap. xvi, 219.

[3] Board's Standing Orders, chap. xvi, 222.

[4] Mad. Reg. V of 1804, secs. 2 and 8, see *ante*, p. 375.

[5] Mad. Reg. V of 1804, sec. 8.

[6] Mad. Reg. V of 1804, sec. 9. This excludes all persons who were at the time the property was taken under the superintendence of the Court entitled by law to the custody of the property of the minor (*ante*, chaps. viii, ix and xi), and would also apparently prevent the same person being appointed manager and guardian of a ward.

[7] Mad. Reg. V of 1804, sec. 10. For form of security, see Board's Standing Orders, Appendix to chap. xvi. Tehsildars or other responsible Government officers need only execute the bond required by the Regulation; Board's Standing Orders, chap. xvi, 214. The security to be furnished by managers may be of any kind—cash, personal, land or other property—according as the Collector directs, but shall be for an amount not less than 10 per cent. of the average monthly transactions of the estate; *ibid.*

Commission of manager.

On the execution of his bond the manager is to be furnished by the Collector with a public commission of management under the seal and signature of the Collector.[1]

Allowance to manager.

An allowance (to be specified in the commission) for the manager in proportion to the extent of his trust is to be fixed by the Court of Wards on the recommendation of the Collector.[2]

Enforcement of penalty and dismissal of manager.

In case of an abuse of trust the Court of Wards may enforce the penalty of the bond and dismiss the manager. The amount recovered from the manager must be carried to the account of the property in trust.[3]

Suit by manager for return of penalty.

A manager may sue in the Civil Courts to recover the penalty which he has been compelled to pay.[4]

Subject to the revision of the Collector, and to the final confirmation or rejection of the Court of Wards, the manager may appoint and fix salaries for the necessary officers. Such subordinate officers are on proof of delinquency liable to punishment in the same manner as the principal managers.[5]

Appointment of subordinate officers.

Manager to have charge of estates.

The manager has the entire charge of the estates, real and personal, of the minor, including all malguzari, and lakhiraj lands; and all houses, tenements, goods, and moveable property, except the house in which the minor resides, and such articles of moveable property as are required for his use and comfort.[6]

Inventory.

On receiving charge, he must deliver to the Collector an inventory under his seal and signature of the property committed to his custody.[7]

Annual accounts.

At the end of the year the manager must deliver to the Collector an account of his receipts and disbursements.[8]

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[1] Mad. Reg. V of 1804, sec. 11. For form of commission, see Appendix to chap. xvi of Board's Standing Orders.

[2] Mad. Reg. V of 1804, sec. 11.

[3] *Ibid.*

[4] *Ibid.*

[5] Mad. Reg. V of 1804, sec. 11. Collectors may require security (ordinarily not exceeding Rs. 500) from shroffs and other subordinate estate servants; Board's Standing Orders, chap. xvi, 214.

[6] Mad. Reg. V of 1804, sec. 12.

[7] *Ibid.*

[8] *Ibid.*

Assessment of lands.

The assessment of lands belonging to the minor is to be fixed in the same manner as the assessment of other lands.[1]

Receipts to be paid monthly to Collector.

The manager must pay monthly to the Collector the entire sums of money received by him from the land under his charge, and the Collector must defray therefrom the authorized expenses of management.[2]

Expenses to be paid by Collector.

A sum equal to ten per cent. of the permanent assessment, or when the whole permanent jama may not be realised, a sum equal to ten per cent. of the revenue actually paid to Government shall be allotted for the support of the minor and of such members of his family as may be entitled to maintenance at his expense.[3]

Allowance for maintenance.

Power to increase or diminish proportion of revenue allowed.

The Collector must pay the allowance monthly to the guardian of the minor in the proportion of the public revenue actually received from the property, and not otherwise, except in the following circumstances; where the proportion of ten per cent. of the public revenue affords a fund greater than is requisite for the suitable expenses of the minor and his family, or where the same effect may be produced by the accumulation of property not assessed, the Collector may reduce at his discretion the proportion of ten per cent., and where the proportion of ten per cent., together with the produce of the minor's unassessed property, is inadequate to his due support, the Collector may at his discretion augment the proportion payable from malguzari lands: Provided that the exercise of this discretionary power shall be reported to the Court of Wards, and shall not be repeated after the first month without due authority be obtained for the same.[4]

Where proportion reduced, difference to be used for minor.

Where the proportion of ten per cent. is reduced, the difference must be incorporated in the assets of the property and employed for the benefit of the minor.[5]

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[1] Mad. Reg. V of 1804, sec. 13.

[2] Mad. Reg. V of 1804, sec. 14.

[3] Mad. Reg. V of 1804, sec. 14. This would include not only the wife and children, but also such dependent members of his family as he would, according to the customs of his religion or race, be morally bound to support; see *ante*, p. 352, note 10.

[4] Mad. Reg. V of 1804, sec. 14.

[5] *Ibid.*

A manager cannot grant a lease[1] extending beyond one year, without the written consent of the Collector. He cannot dispose of[2] any part of the property without the written consent of the Court of Wards.[3] Power to let and sell.

Where the estate yields funds more than adequate to the payment of the public revenue, to the charges of management, and to the expense of maintaining the minor, the Collector may employ the surplus funds for the purpose of improving the property, or in the purchase of land, or in the purchase of Government securities, provided that the Court of Wards in writing previously approve of such appropriation.[4] Appropriation of surplus receipts.

In case of purchases the Collector must transmit the deeds of security[5] of whatever description, to the Court of Wards for the purpose of being deposited in the Government Treasury.[6] Deposits of purchase deeds.

The Collector must grant the manager receipts on account of the owners for such deeds of security as may be deposited in the public treasury, and such deposits are at the risk of Government.[7] Receipts and deeds.

The interest on the public securities purchased for the minor is to be received by the Collector.[8] Interest on Government securities.

On demand and proof the Collector with the permission of the Court of Wards is to pay debts due to private creditors by the estate of the minor ; but the discharge of private debts is not to interfere with the payment of the public revenue.[9] Payments of debts.

Collectors should take care that, except with the sanction of the Court of Wards previously obtained, no remissions are Remissions of debts.

[1] For forms of leases see Board's Standing Orders, Appendix to chap. xvi.

[2] This would include a sale or mortgage, or pledge.

[3] Mad. Reg. V of 1804, sec. 15.

[4] Mad. Reg. V of 1804, secs. 12 and 16. The permanent improvement and extension of the property is to be preferred to the purchase of securities ; Board's Standing Orders, chap. xvi, 215.

[5] This apparently includes deeds of transfer and title-deeds.

[6] Mad. Reg. V of 1804, sec. 16. Government securities are to be deposited with the Accountant-General ; Board's Standing Orders, chap. xvi, 215.

[7] Mad. Reg. V of 1804, sec. 16.

[8] Mad. Reg. V of 1804, sec. 16.

[9] Mad. Reg. V of 1804, sec. 17. A Collector has no authority to bind a ward by a promise under the Indian

granted other than those sanctioned by the custom of the estate.[1]

Proceedings for arrears of rent.

The manager can proceed against tenants for arrears of rent in the same manner as the minor might, if of age, have proceeded under the provisions of Madras Act VIII of 1865, and may exercise all the powers conferred by that Act on landholders, and is subject to the same restrictions, so long as the estate and lands remain under his management.[2]

Assessment and collections.

Where estates are likely to remain for some years under the charge of the Court of Wards, the ryotwar mode of assessing and collecting the revenues should be introduced, and the system of renting out the lands for terms of years should be discontinued, wherever these arrangements are practicable.[3]

Madras Boundary Act.

The manager is a proper person to represent the ward in proceedings under the Madras Boundary Act (XXVIII of 1860).[4]

Notice of salt made or imported into lands in charge of Court of Wards.

He is subject to the same penalties as other guardians of minor's estates for omitting to give notice of salt made in or imported into the lands in his charge.[5]

Appointment of guardian.

The Court of Wards must appoint a guardian for the minor according to the mode provided for the appointment of managers.[6]

Disqualifications.

The next heir of a minor cannot be appointed guardian. Persons who may appear to have a direct or indirect advantage in the death or continued uncapacity of the minor are also ineligible.

Females.

Only females can be appointed guardians of females.[7]

Contract Act to pay a debt, which is barred by limitation; *Suryanarayana* v. *Narendra Thatraz*, I. L. R., 19 Mad., 255; IX of 1872, sec. 25.

[1] Board's Standing Orders, chap. xvi, 211. In times of scarcity it may be necessary to grant relief, and in such cases Collectors must report the facts fully to the Court, which will then pass such orders as it may think fit in each case; *ibid.*

[2] Mad. Act VIII of 1865, sec. 85.

[3] Board's Standing Orders, chap. xvi, 210.

[4] *Kamaraju* v. *Secretary of State*, I. L. R., 11 Mad., 309.

[5] *Ante*, p. 138. Mad. Reg. I of 1805, sec. 13.

[6] Mad. Reg. V of 1804, sec. 19. *Ante*, p. 380.

[7] Mad Reg. V of 1804, sec. 19.

Testamentary appointment.

Possessors of property paying revenue directly to Government, whose heirs are minors, may nominate by will in writing persons to be guardians of such heirs. Such nominations are valid, provided that the persons chosen are qualified and willing to accept the trust; and that such nominations are duly reported by the Collector and finally confirmed by the Court of Wards.[1]

Security to be given by guardians.

The guardian must give security for his personal appearance during the guardianship and must execute a bond in the prescribed form.[2]

Commission of guardian.

On the execution of the bond the guardian is to be invested with his trust by a public commission under the seal and signature of the Collector.[3]

Salary of guardian.

When a suitable guardian who will execute the office gratuitously cannot be found, a fixed salary shall be allowed to the guardian at the discretion of the Court of Wards.[4]

Application of allowance.

The guardian may receive the ward's allowance, and apply it at his discretion for the benefit of the ward subject to the inspection and control of the Collector and the Court of Wards.[5]

Powers of guardian.

The guardian appointed by the Court of Wards possesses the same powers as guardians otherwise appointed.[6]

Duration of office.

The Regulation further provides that the duration of the office of guardian shall not continue longer than the eighteenth year of the age of the minor.[7]

[1] Mad. Reg. V of 1804, sec. 19. The report and confirmation may apparently be made at any time before or after the death of the proprietor.

[2] Mad. Reg. V of 1804, sec. 21. For form of security see Board's Standing Orders; Appendix to chap. xvi. Tehsildars or other responsible Government officers need only execute the bond required by the Regulation. Guardians are required to furnish security in the shape of cash only: the amount shall in the case of paid guardians not exceed three months pay or Rs. 100, whichever is greater; and in the case of unpaid guardians it shall be Rs. 100; Board's Standing Orders, chap. xvi, 214.

[3] Mad. Reg. V of 1804, sec. 21. For form of commission see Board's Standing orders; Appendix to chap. xvi.

[4] Mad. Reg. V of 1804, sec. 21.

[5] Mad. Reg. V of 1804, sec. 21.

[6] Mad. Reg. V of 1804, sec. 21. These words would apparently confer upon guardians appointed by the Court of Wards only the powers possessed by guardians appointed by a Civil Court. As to the powers of guardians, see *ante*, chap. xvi.

[7] Mad. Reg. V of 1804, sec. 21; the age of majority of minors under

Servants.

The guardian must choose and recommend proper servants to be employed in the service of the ward, subject to the approval of the Collector and of the Court of Wards. The wages of these servants must be defrayed from the funds appointed for the maintenance of the ward.[1]

Accounts of guardian.

The guardian must deliver to the Collector monthly accounts of his receipts and disbursements. These accounts may be revised and retrenched by the Collector. He must also deliver to the Collector annual accounts supported by vouchers, and attested by a solemn declaration of their correctness.[2]

Education of male wards.

Female relations are not to have charge of a male minor after the age of seven years, at which age proper teachers must, subject to the approval of the Court of Wards, be procured and appointed by the guardian for the education of the minor in a manner suitable to his rank and condition in life. The progress of the education of a male minor is at all times liable to the enquiries and inspection of the Collector.[3]

Act XXI of 1855.

Act XXI of 1855 has made the following provisions for the education of male minors, and the marriage of male and female minors subject to the superintendence of the Madras Court of Wards.

General control of education of male wards.

Section 1 vests the general superintendence and control of the education of a male ward in the Collector of revenue acting under the Court of Wards in the district wherein the ward's estate is situate, or if the ward is possessed of immoveable property in different districts in such one of the Collectors of revenue of such districts as the Court of Wards shall select.

Education at school or college.

By section 2 such Collector may direct that the ward shall reside either with or without his guardian at the sadr station of the district, or at any other place within

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the Court of Wards has now been raised to 21 (see *ante*, p. 9), and this would apparently extend the power given to guardians by this section of the Regulation.

[1] Mad. Reg. V of 1804, sec. 21; as to how the maintenance is to be provided, see *ante*, p. 382.

[2] Mad. Reg. V of 1804, sec. 21; as amended by Act II (M. C.) of 1869.

[3] Mad. Reg. V of 1804, sec. 21.

the Presidency, and shall attend for the purposes of education such school or college as to the Collector may seem expedient, and he may make such provision as may be necessary for the proper care and suitable maintenance of the ward whilst attending such school or college.[1]

Education by private tutor.

By section 3, if it shall appear to the Collector inexpedient to place the ward at a school or college, he shall cause him to be educated by a private tutor, properly qualified, either at the ward's family residence, or at the sadr station, or elsewhere within the Presidency, and in that case also the Collector has power to determine from time to time the place of residence of the ward, and to make such provision as may be necessary for his proper tuition and maintenance during the period of his education.

Charges to be paid out of profits of estate.

By section 4 all charges and expenses which may be incurred on account of any male minor ward under the provisions of the Act, for college or school fees, or for other charges of tuition or education, or by reason of his residence in any place other than his own home, or otherwise, shall be defrayed from the profits of his estate, in the same manner as other expenses incurred under the authority or with the sanction of the Court of Wards.[2]

Removal of guardian for disobedience.

By section 5 the Court of Wards may, on the application of a Collector, remove from office any guardian who neglects or refuses to obey, or evades compliance

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[1] Education at school or college is generally to be preferred to private tuition at home. In their Standing Orders (chap. xvi, 212), the Board of Revenue say, "It is not possible to overestimate the civilizing effects which are likely to be produced on the country by withdrawing minor heirs and their brothers for a time from their homes when their position there is subjecting them to vicious influences, and by carefully training their minds to a just comprehension of their future responsibilities. On the other hand, care must be taken to prevent the objects which Government would secure by this measure from being misrepresented so as to excite prejudice and collisions fatal to its success." Monthly reports of attendance and progress should be obtained from the headmasters of schools. Collectors should communicate freely with Inspectors, and, in the case of female wards, Inspectresses, of schools on the subject of the education and training of children under their charge, but wards should not be sent to mission schools against the wishe of their relatives; *ibid.*

[2] *Ante*, p. 382.

with, any orders passed or directions given by the Collector under the provisions of this Act, and may cause a new guardian to be appointed in his place, whether the person so removed shall have been first invested with the guardianship of the minor upon the nomination of a Collector acting under the Court of Wards, or by a testamentary appointment confirmed by the Court of Wards.

Liability of guardian removed. Powers and responsibility of new guardian.

By section 6 the guardian so removed, notwithstanding his removal, continues liable to account to the Collector for his receipts and disbursements during the period of his guardianship, and every guardian appointed in the place of a guardian so removed is to be chosen in the same way, and to have the same rights and powers, and be subject to the same responsibilities, as persons originally appointed to be guardians of minors by a Collector of revenue acting under the Court of Wards.

Custody of male minor.

Section 7 vests the right to the custody of the person of any male minor whose property is under the management of the Court of Wards, in the person appointed with the sanction of the Court of Wards, either originally or upon removal of a former guardian, to be the guardian of such minor, or, in the absence of any such person, the Collector of revenue having the superintendence of the education of such minor under the provisions of the Act.[1]

Foregoing section applicable to younger brothers of wards.

By section 8 whenever a ward has a younger brother or brothers entitled to maintenance at the charge of the estate, the above powers and provisions for promoting the education of the ward are made applicable to such younger brother or brothers.

Penalty for abetting marriage of ward without leave of Collector.

By section 9 whoever knowingly aids or abets the marriage of any minor whose property is under the superintendence of the Court of Wards, or the marriage of a younger brother or sister of such minor, without the leave of the Collector of revenue acting under the Court of Wards to such marriage first had and obtained, shall,

[1] *Ante.* p. 386.

on conviction before a Court of Session, upon the prosecution of such Collector, be liable to a fine not exceeding two thousand rupees, or to imprisonment not exceeding the term of six months, with or without hard labour.[1]

Appeal from Collector to Court of Wards.

By section 10 all orders and proceedings of a Collector under this Act are subject to the revision of the Court of Wards, and every person aggrieved by any such order or proceeding may prefer an appeal therefrom to the Court of Wards.

Education in management of estate.

Care should be taken to teach minors the revenue law, and customs applicable to their estates. They should be trained also to the use of survey maps, and the understanding of revenue accounts. During the year or two previous to coming of age they should also be taken over their estates and have things explained to them by a competent revenue officer.[2]

Females.

The guardian of a female ward must provide for her proper education.[3]

Authentication of papers.

The guardian and manager must authenticate papers with their own seals and signatures and not otherwise.[4]

Seals of ward and deceased parents.

The seals of the ward, together with the seals of his deceased parents must be delivered to the Collector and lodged in his treasury.[5]

Enquiry into conduct of guardians and managers.

In cases of fraud imputed to a guardian or a manager the Court of Wards may order an enquiry to be made in the first instance by the Collector, and may pass judgment on the result of such enquiry.[6] Where the attendance of witnesses may be required, the Collector or the Court

Witnesses.

[1] The absence of the leave of the Collector does not render invalid a marriage otherwise valid. As to the marriage of minors, see *ante* chap. xxiii. No. 213 of the Board of Revenue's Standing Orders, chap. xvi. is as follows:—"The Court of Wards attaches much importance to the postponement of the marriage of minors to a reasonable period of both physical and mental maturity. Collectors will, therefore, be careful to permit no steps whatever to be taken in that direction, without the special consent of the Court, and will use their influence to obtain the friendly co-operation of the relatives of minors to the same end.

[2] Board's Standing Orders, chap. xvi, 212. Cf. Rules of Court of Wards Bengal and N.-W. P., *ante*, pp. 352, 372.

[3] Mad. Reg. V of 1804, sec. 21.

[4] Mad. Reg. V of 1804, sec. 22.

[5] Mad. Reg. V of 1804, sec. 22.

[6] Mad. Reg. V of 1804, sec. 24. The enquiry can only be made on the person charged having an opportunity of appearing and making a defence.

of Wards must apply by writing to the District Court, to the end that the witnesses may be duly summoned to attend.[1] Copies, duly authenticated, of the judgment of the Court of Wards shall be transmitted to the District Court, and such judgment shall be enforced in the same manner as if it had been passed by the District Court.[2]

Execution of judgments.

Appeal to High Court.

An appeal lies from such judgment directly to the High Court, provided that the appeal be preferred to the Court of Wards, or to the District Court, or to the High Court within three calendar months next subsequent to the date of the judgment. The High Court, where good ground for the delay is shown, can dispense with this limitation in the case of appeals to itself only.[3]

Extension of time for appeals.

Adoption.

A ward of the Court of Wards cannot adopt children without the previous consent in writing of the Court of Wards.[4]

Collectors, managers, and guardians liable to be sued.

Collectors, managers, and guardians are liable to be sued in the Civil Courts for acts done by them with respect to the abuse of the property or persons of wards; and in cases where the property of wards has been restored to them or to their heirs and successors they may sue the Collector, manager, or guardian for the recovery of damages for injuries sustained by them or by their property during the time of their incapacity.[5]

Costs of Collector.

Where the act for which he is sued has not been authorized in writing by the Court of Wards, the Collector must defend the suit at his own cost.[6]

Exemption from payment of revenue.

The lands of minors under the Court of Wards are not answerable[7] for the payment of public revenue assessed

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[1] Mad. Reg. V of 1804, sec. 24. They must be summoned in accordance with the provisions of the Civi Procedure Code (Act XIV of 1882), secs. 159 to 178. This applies to the witnesses on both sides.

[2] Mad. Reg. V of 1804, sec. 24. See Act XIV of 1882, chap. xix.

[3] Mad. Reg. V of 1804, sec. 24. Although the appeals may be preferred to the Court of Wards and the District Court, the High Court only can apparently deal with such appeals.

[4] Mad. Reg. V of 1804, sec. 25. Cf. Act IX (B.C.) of 1879, sec. 61, *ante*, p. 361.

[5] Mad. Reg. V of 1804, sec. 26; see *ante*, pp. 314, 315.

[6] Mad. Reg. V of 1804, sec. 27.

[7] *i.e.*, cannot be sold. After the estate is made over to the proprietor

thereon ; and, if the net collections of any year are unequal to the discharge of the fixed assessment, the deficiency must be made good by the surplus collections of future years ; provided that the allowance for the support of the minor shall be paid as well in years of deficient as of surplus produce.[1]

Property of minor exempt from sale for arrears of revenne.

As in Bengal[2] so in Madras no estate, the property of a minor, and descended to him by the regular course of inheritance which might have been taken charge of by the Court of Wards,[3] but which is not under the charge of that Court, can during his minority be sold for arrears of revenue accruing subsequently to his accession to the same.[4]

The following rule has been made by the Board of Revenue with reference to the restoration of estates[5] :—

Restoration of estate.

Applications for the Court's sanction for the restoration of estates to wards when their disqualification ceases should be made at least three months prior to the proposed date of restoration.[6] In cases where there is more than one minor in charge of the Court, and only one of them attains majority, the Collector should state his opinion whether the interests of the minors will suffer by allowing the one, who will come of age, to assume the management of the family property ; and, if so, whether he would propose to retain the estate under management or effect a partition.[7]

A statement showing the results of the Court's management should be submitted as soon after the restoration as possible[8]

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revenue which has accrued due during the management is not recoverable. Arrears outstanding against the estate when taken under management may be recovered.

[1] Mad. Reg. V of 1804, sec. 14. Cf. Act IX (B.C.) of 1879, sec. 23, *ante*, pp. 356—358. Collectors should see that all Government dues accruing during the management are collected before the estate is handed over to the proprietor as they must be written off when the estate is made over ; Board's Standing Orders, chap. xvi, 210.

[2] *Ante*, p. 358.

[3] *Krishna* v. *Mekamperuma*, I. L. R., 10 Mad., 44, *ante*, p. 375, note 4,

[4] Mad. Reg. X of 1831, sec. 2.

[5] Board's Standing Orders, chap. xvi, 221.

[6] The Court of Wards would not be able to refuse the restoration of his estate to a ward on attaining majority on the ground that this rule has not been complied with.

[7] The Court cannot retain charge if one of the joint owners ceases to be incapacitated, see *ante*, p. 375, note 4.

[8] Board's Standing Orders, chap. xvi, 221, which see as to retaining a portion of the establishment after restoration. For form see Appendix to Board's Standing Orders, chap. xvi,

CHAPTER XXXVI.

SUITS BY AND AGAINST WARDS OF COURTS OF WARDS.

Suits by and against wards of Courts of Wards.

THERE are certain special provisions as to suits[1] brought by or against wards of the Court of Wards, which must be followed,[2] whether the cause of action arises before or after the minor becomes a ward of the Court.[3] Where, however, the minor has been represented by the Court of Wards, and his interests have been sufficiently guarded, it does not follow that an omission to follow the letter of these provisions is fatal to the suit, or prevents the decree from binding the minor.[4]

In matters for which no special provision is made by a local law the Civil Procedure Code[5] applies.

Notice of suit.

It is not necessary to give notice of a suit against a ward of the Court of Wards, even though he may have to be represented by the Collector in such suit;[6] but no suit can be brought against a Commissioner or Collector[7] for an act purporting to be done by him in his official

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[1] They apply only to suits properly so called; see *Kamaraju* v. *Secretary of State*, I. L. R., 11 Mad. at p. 315. As to suits brought after the death of a ward, when the succession is in dispute, see *Soomongul Kooer* v. *Courts of Wards*, 17 W. R. C. R., 560.

[2] Secs. 442 to 462 of Act XIV of 1882 (*ante*, chap. xxv) which deal with the appointment of next friends and guardians for the suit, and their powers to receive money and compromise suits, do not derogate from the provisions of any local law for the time being in force relating to suits by or against minors; Act XIV of 1882, sec. 464, as amended by Act VIII of 1890, sec. 53E.

[3] *Sheodial Chaubey* v. *Collector of Gorakhpur*, I. L. R., 5 All., 265.

[4] *Asharfilal* v. *Deputy Commissioner of Bara Banki*, I. L. R., 22 Calc., 729; L. R., 22 I. A., 90; *Hardinarain Sahu* v *Ruderperkash Misser*, I. L. R., 10 Calc., 626; L. R., 11 I. A., 26; *Beresford* v. *Ramasubba*, I. L. R., 13 Mad., 197.

[5] Act XIV of 1882, *ante* chap. xxv.

[6] *Anatharaman* v *Ramasami*, I. L. R., 11 Mad., 317.

[7] *Collector of Bijnor* v. *Manuvar*, I. L. R., 3 All., 20; *ante*, p. 315.

capacity, except after the notice required by the Civil Procedure Code.[1]

Conflict of interests represented by Collector or manager.

It may happen that the Collector, manager or other person required by law to represent a litigant ward of the Court of Wards is required to represent wards whose interests are adverse to one another. It is the duty of the Court of Wards to prevent any such conflict of interests. In Bengal this can be done by an order under sec. 52 of the Court of Wards Act, 1879.[2] In Madras the difficulty can frequently be prevented by one of the litigants being plaintiff, and the other being made defendant, in which case the guardian need not be next friend.[3] Where that course is impossible, the only course open is to appoint different guardians for the wards whose interests are in conflict. In the case of wards of the Court of Wards of the North-Western Provinces, the only course open is to cause different guardians to be appointed.

A suit by or against a ward of the Court of Wards cannot be tried by the officer, who, as representing the Court of Wards, or in any other capacity, caused the suit to be instituted or defended[4]; or has been concerned in the prosecution or defence of the suit.

Wards of Bengal Court of Wards.

The Court of Wards Act 1879 contains the following provisions as to suits by or against wards of the Bengal Court of Wards, but they do not apply to suits instituted or pending in the High Court ;[5]

Manager or Collector to be next friend or guardian for the suit.

"Section 51. In every suit brought by or against any ward he shall be therein described as a ward of Court and the manager of such ward's property, or if there is no manager, the Collector of the district in which the greater part of such property is situated, or any other

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[1] *i.e.*, until the expiration of two months next after notice in writing has been delivered to, or left at the office of the proposed defendant, stating the cause of action and the name and place of abode of the intending plaintiff, and the relief which he claims; Act XIV of 1882, sec. 424, as amended by Act VII of 1888, sec. 36.

[2] Act IX (B. C.) of 1879, *post*, p. 394.

[3] See *post*, p. 400.

[4] *Bikromajeet M. O. Deb* v. *Court of Wards*, 21 W. R., C. R., 312.

[5] Act IX (B. C.) of 1879, sec. 56.

Collector whom the Court of Wards may appoint in that behalf, shall be named as next friend or guardian for the suit, and shall in such suit represent such ward,[1] and no other person shall be ordered[2] to sue or be sued[3] as next friend or be named as guardian for the suit by any Civil Court in which such suit may be pending.[4]

Court may substitute another person to be next friend or guardian for the suit.

"Section 52. The Court of Wards[5] may, by an order, nominate or substitute any other person to be next friend or guardian for any such suit; and upon receiving a copy of any such order of substitution, the Civil Court in which such suit is pending shall substitute the name of the next friend or guardian for the suit so appointed for the name of the manager or Collector.

Payment of costs.

"Section 53. If in any such suit any Civil Court shall decree any costs against the next friend or guardian for the suit of the ward, the Court of Wards[6] shall cause such costs to be paid out of any property of the ward which, for the time being, may be in its hands.

Service of process against ward.

"Section 54. Every process which may be issued out of any Civil Court against any ward shall be served, through the Collector, upon the next friend or guardian for the suit as aforesaid of such ward.[7]

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[1] This course should be strictly followed; *Abdool Hye* v. *Banee Pershad*, 21 W. R. C. R., 228. It is not proper to make the manager plaintiff or defendant, even though he be described as the manager of the ward's estate; *Abdool Hye* v *Mitterjeet Singh*, 23 W. R. C. R., 348; see *ante*, pp. 264, 270. The next friend or guardian, whether he be manager or not, must act subject to the control and orders of the Court of Wards.

[2] *i.e.*, permitted.

[3] The words "or be sued" have apparently been inserted in the Act by mistake; no one can in any Court be sued as next friend.

[4] Where the minor has been represented, and his interests have been looked after, a Court of appeal would not interfere on the ground that the provisions of this section had not been complied with to the letter; see *ante*, p. 392.

[5] Or the Commissioner; Court of Wards Rules, sec. I, rule 8 (*m*).

[6] Or the Commissioner; Court of Wards Rules, sec. I, rule 8 (*m*). The Commissioner can also sanction the payment of any damages which may be decreed against the ward; *ibid.*

[7] Although the Collector is responsible for the service, the Civil Court in determining whether a process had been served would have to be satisfied not only that it has been delivered to the Collector, but also that it has been served in accordance with the Civil Procedure Code (Act XIV of 1882, secs. 72 to 80) through the Collector.

"Section 55. No suit shall be brought on behalf of any ward by a manager,[1] unless the same be authorized by some order of the Court:[2] Suit to be authorised by Court.

Provided that a manager may authorize a plaint to be filed in order to prevent a suit from being barred by the law of limitation, but such suit shall not be afterwards proceeded with except under the sanction of the Court.[3]

Provided also that suits for arrears of rent[4] may be brought on behalf of any ward if authorized by an order of the manager of the landed property on which such rents are due."

A Commissioner may order all things to be done, which may be requisite for the proper conduct of any suit in which a ward is concerned.[5] Power of Commissioner.

The only suits which can be brought without reference to the Legal Remembrancer are suits (other than those which are excepted from the cognisance of a Provincial Court of Small Causes)[6] where the value is less than Rs. 500, and no question of legal principle is involved.[7] No proceeding of any kind should be Institution of suits without reference to Legal Remembrancer.

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[1] The words "by a manager" were inserted by Act III (B.C.) of 1881, sec. 7.

[2] Or of the Commissioner; Court of Wards Rules, sec. I, rule 8 (*n*). No order is necessary to authorize a manager to file a certificate under the Public Demands Recovery Act (VII of 1880 (B. C.), sec. 7, *ante*, pp. 354, 362). In *Hardinarain Saha* v. *Ruderperkash Misser*, I. L. R., 10 Calc., 626; L. R., 11 I. A., 26; the Privy Council declined to allow an objection to the manager's authority to sue on the ground that the objection was merely technical. This case was followed in *Beresford* v *Ramasubba*, I. L. R., 13 Mad., 197. It was held in *Dinesh Chunder Roy* v. *Golam Mostapha*, I. L. R., 16 Calc., 89, that where there is no order of the Court authorising the bringing of such suit, the suit must be dismissed, and that sanction given after appeal filed cannot have a retrospective effect; cf. *Oriental Bank* v *Gobind Lall Seal*, I. L. R., 9 Calc., 604; 13 C. L. R., 142.

[3] If the Court of Wards refuses to sanction the suit, the Civil Court should reject the suit as being incapable of being prosecuted; *Biseswar Roy* v *Shoshi Sikar Eswar Roy*, I. L. R., 17 Calc., 688; L. R., 17 I. A., 5.

[4] *i.e.*, a suit which claims arrears of rent and nothing else. A suit which claims also a right to ejectment must be authorised by the Court of Wards; Wards Manual, p. 28.

[5] Court of Wards Rules, sec. I, rule 8 (*n*).

[6] Act IX of 1887, sched. II.

[7] Court of Wards Rules, sec. VIII (*m*) rule 7. If the case assume an unforeseen importance it should be referred; *ibid.*

instituted or defended in the High Court unless under the orders of the Legal Remembrancer.[1]

Conduct of suits.

After institution, suits are as a general rule to be conducted by the Collector under the supervision of the Commissioner; but in the case of large estates with experienced managers, the conduct of such suits may with the sanction of the Commissioner, be left to managers.[2]

Local pleaders to be consulted.

Collectors or managers before instituting or defending suits should obtain the opinion of the local pleader employed by them, and should be careful not to enter upon any suit, which may probably involve important issues, without reference to the Legal Remembrancer or the Board.[3]

Important suits not to be entered upon without reference.

Whe ever the Commissioner sees reason to apprehend that any case is likely to assume unforseen importance, he should call for such information as will enable him to judge whether the advice of the Legal Remembrancer is necessary, and, if such advice seems necessary, should forward the papers to the Legal Remembrancer.[4]

Reference to Board if appeal appears necessary.

Whenever an appeal appears to be necessary in a case conducted without reference to the Legal Remembrancer, a reference should be made to the Board so as, if possible, to admit of their passing orders in time for the institution of the appeal; but if orders are not received the appeal may be instituted.[5]

Appeal to High Court.

No appeal can under any circumstances be made to the High Court without reference to the Legal Remembrancer.[6]

Suits by and against wards of N.-W. P. Court of Wards.

Minors whose property is in charge of the Court of Wards of the North-Western Provinces, and for whom guardians have been appointed, must sue and be sued in Civil Courts by and in the names of their guardians, but no such suit can be instituted, defended, compromised or otherwise dealt with by any such guardian without the previous sanction of the Court of Wards.[7]

Where guardian appointed.

[1] Court of Wards Rules, sec. VIII (*m*) rule 7.

[2] *Ibid*, rule 8.

[3] *Ibid*, rule 9.

[4] *Ibid*, rule 10.

[5] Court of Wards Rules, sec. VIII (*m*), rule 11. An appeal under sec. 16 of the Public Demands Recovery Act (VII (B.C.) of 1880) on behalf of a ward's estate against the orders of a Certificate Deputy Collector may be made without reference to any authority higher than the Collector, unless the case is one of an unusual and specially difficult character; note to Court of Wards Rules, sec. VIII (*m*), rule 11. Copies of the plaint, reply, decision, grounds of appeal, Government pleader's opinion, and the remarks of the Collector should be sent up to the Board; *ibid*, rule 12.

[6] *Ibid*, rule 13.

[7] Act VIII of 1879, sec. 23, amending Act XIX of 1873, sec. 205.

Where no guardian appointed.

Minors whose property is in charge of such Court of Wards, and for whom guardians have not been appointed, must sue and be sued in Civil Courts by and in the name of the Collector of the district in which the suit is brought.[1]

The following rules of the Board of Revenue of the North-Western Provinces apply to suits by and against wards of the Court of Wards.

Duty of Collector, before institution of suit.

When the Collector proposes to institute a suit he shall prepare and submit to the Board through the Commissioner a memorandum containing the following particulars.

(1) A clear and detailed report of the circumstances which have rendered the suit necessary.

(2) The relief sought for and, where such relief relates to land, an accurate description of the land giving numbers, where such land is numbered in a Government register, the precise amount of the share sued for or the boundaries, &c., as the case may require.

(3) The cause of action and when it accrued.

(4) A brief account of the steps taken to obtain satisfaction from the defendant otherwise than by the institution of a suit, and the objections or excuses made by the defendant to rendering such satisfaction.[2]

(5) Copies, as far as possible, of all documents on which the claim is based, or which are to be adduced in support of the claim. Where these are very voluminous or bulky, extracts may be furnished, but care must be taken to give such extracts accurately as they stand, and to omit no portion which may explain or qualify such extracts. In every case the stamp engrossed on such documents and the fact whether they are registered or not must be clearly noted.

(6) A certificate to the effect that the Collector has satisfied himself by enquiry that the person against whom the suit is to be laid is possessed of sufficient means to ensure the recovery of the amount (if any) which may be decreed against him, or a memorandum shewing why the Collector considers that action should be taken, irrespective of any hope of recovery of the amount sued for.

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[1] Act VIII of 1879, sec. 23, amending Act XIX of 1873, sec. 205.

[2] No suit is to be instituted except as a last resort, when all other means of obtaining satisfaction have failed, and none is to be proposed until the defendant has had ample opportunity of stating his view of the case and of coming to some agreement thereon; Rules of Board of Revenue, N.-W. P., chap. i, rule 10.

Preparation of plaint.

The Collector must also prepare a plaint and send it with a translation of all vernacular papers. All papers should be written on half margin and on one side only of the paper, and they should be numbered and fastened together in the ordinary form of a brief. When, in any case in which a cause of action has arisen, the Collector is of opinion that resort should not be had to legal proceedings, he shall, if the value involved is more than Rs. 250, report the case, with the reasons for the opinion he has formed, to the Commissioner, and the Commissioner shall forward the papers received from the Collector with his own opinion to the Board. The case will then be forwarded with the orders of the Board to the Legal Remembrancer, who, unless otherwise directed by the Board, will address the Collector direct, sanctioning or vetoing the institution.

When the institution of a suit has been sanctioned the Collector must communicate direct to the Legal Remembrancer.

Government Pleader.

The Government pleader is directly responsible for the conduct of every case.

Suit in which Court of Wards is defendant.

On receipt of notice under sec. 424 of the Civil Procedure Code[1] the Collector must obtain all necessary information, and if he considers that the plaintiff has a valid claim, and is willing to compromise, or if he consider that it should be satisfied in full, he should report to the Commissioner so as to get the sanction of the Board.

Duty of Collector.

If he considers that the suit should be defended he must report at once to the Board.

On being served with the summons[2] the Government Pleader must give information to the Collector who shall forward through the Commissioner to the Board :—

Report to Board.

(*a*) A full and detailed narrative of the circumstances which led to the suit, if not previously submitted.

(*b*) A copy of the plaint, with translation in half margin, and the documents filed with the plaint.

(*c*) A memorandum of the proposed defence, also in half margin, showing clearly and fully how each of the allegations of the plaint is to be met and the evidence which he proposes to adduce to disprove it.

(*d*) Copies of the documents relied on by the defence. The purport of any other documents affecting the case shall be briefly stated, so that all the principal links in the evidence may be given.

The case then goes to the Legal Remembrancer, who thereafter communicates directly with the Collector.

Urgent cases.

In urgent cases the Collector need not await the final instructions of the Board or Legal Remembrancer. He can institute or

[1] See *ante*, p. 315.

[2] See Act XIV of 1882, sec. 419.

defend a suit, but he must forward the papers and explain the circumstances to the Board.

Intervention in suits.

If the Collector considers it necessary to intervene in a suit he should apply to the Court for a postponement, and submit a full report through the Commissioner to the Board.

If the Court refuses to postpone the case then the Collector can intervene, giving a report and his reasons to the Board.

Appeals.

On a case being decided against the Court of Wards, the Government pleader must send a copy of the judgment and decree to the Collector, who will forward them to the Legal Remembrancer with an opinion as to whether an appeal should be preferred or not. Should the Legal Remembrancer differ from the Collector as to whether an appeal should be filed, he must refer the matter to the Board. Appeals are only to be filed when there are strong reasons for contesting a decision and sufficient funds to defray the costs.

When an appeal is preferred from a judgment given in favour of the Court of Wards, the Collector besides forwarding in English a copy of the memorandum of appeal shall submit to the Legal Remembrancer a copy of the grounds on which it is proposed to defend the appeal, and draw his attention to any fresh evidence or new point in the case. In appeals also the Collector must communicate directly with the Legal Remembrancer. The conduct of the appeals is in the hands of the Government pleader.

Appeals to High Court.

The Board must determine whether appeals are to be preferred to the High Court.[1] Appeals in the High Court are conducted by the Legal Remembrancer.

Execution of decrees.

The recovery of costs and of sums decreed in favour of the Court of Wards must be carried out by the Collector under direction of the Legal Remembrancer, who on receipt of the decision is to issue a letter of realization which shall be returned month by month, and will show what steps have been taken during the month.

Suits and proceedings in Revenue Courts.

The manager may, subject to the control of the Collector, institute, defend, compromise or otherwise deal with suits, applications or other proceedings in Revenue Courts, relating to the property entrusted to him.[2] He may also sue and be sued under the North-Western Provinces Rent Act.[3]

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[1] If the Collector considers that it should be preferred, he shall within one month from the date of the decree submit his reasons to the Legal Remembrancer, who will refer the case to the Board.

[2] Act VIII of 1879, sec. 24.

[3] Act XII of 1881, sec. 105. The Collector can cause these suits and applications to be instituted and defended without reference to the Board.

Suits against wards of Madras Court of Wards.

Section 23 of Madras Regulation V of 1804, provides that suits against wards of the Madras Court of Wards, being in the custody of guardians, shall only be brought under the protection and in the joint name of their guardians.[1]

Suits by such wards.

In the case of suits on behalf of wards of the Madras Court of Wards the ordinary law[2] applies.[3]

The Standing Orders of the Board of Revenue require[4] suits in regard to the persons of wards to be brought in the names of their guardians and suits in regard to their estates to be brought in the names of their managers.[5]

The following orders have been made by the Madras Board of Revenue.[6]

Sanction of Court of Wards.

1. Collectors should not institute any important suits in Civil or Revenue Courts on behalf of estates under the Court of Wards without the sanction of the Court. When applying for such sanction Collectors should also forward draft plaints for the Court's approval, but ordinary suits for the recovery of debts and other dues may be instituted by them without the previous sanction of the Court in the ordinary or Small Cause Courts, provided there is provision in the budget[7] for law charges.

Appeals.

Collectors may also, without reference to the Court of Wards, institute or oppose appeals in summary or other suits of a petty nature not involving any important question of law.

2. Divisional officers should not institute suits without the sanction of the Collector.

Report to Court of Wards.

3. All suits other than petty ones should be reported to the Court of Wards, and drafts of the written statements proposed to be filed in answer to the suits should also be forwarded for

[1] This does not include a proceeding under the Madras Boundary Act (XXVIII of 1860); *Kamaraju* v. *Secretary of State*, I. L. R., 11 Mad., 309.

[2] There is a further provision in sec. 23 of the same Regulation giving disqualified landholders power to appoint agents for the purpose of prosecuting fraudulent Collectors, guardians and managers, but this could scarcely be construed as applying to minors, who according to the ordinary law, cannot appoint agents.

[3] *Ante*, chap. xxv. See *Beresford* v. *Ramasubba*, I. L. R., 13 Mad., 197.

[4] Chap. xvi, 218 (7).

[5] *i. e.*, as next friends. The same order makes similar provision as to minor defendants, but the Regulation (sec. 23) requires all suits against minor wards to be brought in the joint name of their guardian.

[6] Board's Standing Orders, chap. xvi, 218.

[7] *Ante*, p. 379.

approval. Petty suits may be defended without reference to the Court of Wards.

Report of result.

4. The result of all suits and appeals, the institution or defence of which is sanctioned by the Court of Wards should be reported to the Court, but copies of the decrees and judgments in such suits need be forwarded to the Court only in the following cases :—

(*a*) When the decision is unfavourable to the Court's ward, and it has to be decided whether an appeal is necessary or not :

(*b*) When full costs are allowed, and an appeal may lie on that score :

(*c*) When the judgment contains a ruling or other matter of importance.

Application for sanction to oppose appeal.

When the Court's sanction is applied for for opposing an appeal against a decision in which a ward is interested, copies of the decree and judgment of the lower Court should be forwarded if this has not already been done.

Expenses of suits.

5. Collectors are authorised to incur all *ordinary* charges incidental to the conduct of suits instituted or defended by them at their own instance or in anticipation of sanction, or with the approval of the Court of Wards, provided there is provision in the budget.[1] When there is no provision in the budget, or when extraordinary charges have to be incurred, the sanction of the Court must be obtained. A memorandum showing the charges incurred.

Collectors under this authority under the several heads such, as stamp duty, process fees, pleaders' fees, &c., should accompany the monthly accounts current, a certificate being added to the effect that no ordinary charges requiring the Court's sanction have been included therein.

Pleaders' fees.

6. In regard to pleaders' fees, Collectors must make the best terms they can, but should try as a rule not to pay more than the regulation fees in all ordinary cases, and bargain for a consolidated sum when a number of exactly similar cases, of which only one has to be argued, has to be dealt with. Collectors are at the same time granted a discretionary authority to allow fees to pleaders not exceeding Rs. 25 in each case where the regulation fees are less than that amount, if the circumstances of the case render a higher fee necessary.

Small Causes.

In Small Cause cases, pleaders' fees should ordinarily be paid at the rate of Rs. 5 for Rs. 100 with a maximum of Rs. 5 and a minimum of Re. 1, half fees only being allowed in cases decided *ex parte*, withdrawn, or compromised at the commencement.

Employment of pleaders.

7. As the Court of Wards and Collectors are not bound to employ the Government pleaders for the conduct or defence of

[1] *Ante*, p. 379.

suits connected with estates under management, so Government pleaders are not bound to give gratuitous advice in matters connected with such estate. In districts where such litigation is considerable, Collectors may possibly be able to obtain without payment the advice of the pleader who is regularly retained by them in estate cases, when such advice is not in connection with any pending suit or does not lead to one. When the business of the Court of Wards in the district is not sufficient to enable the Collector to obtain advice on these terms, special terms should be arranged regarding consulting fees.

Counsel.

Collectors should not address or employ counsel resident in the town of Madras or carry on the conduct of cases in a Madras Court, except through the Court of Wards.

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AND

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WITH A COMMENTARY

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